TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914. 1915

No. 3[redacted]68

DETROIT AND MACKINAC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MICHIGAN RAILROAD COMMISSION AND FLETCHER PAPER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED FEBRUARY 10, 1915.

(24,053)

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(24,053)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 360.

DETROIT AND MACKINAC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MICHIGAN RAILROAD COMMISSION AND FLETCHER PAPER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 5, 1914.

a DETROIT & MACKINAC RAILWAY COMPANY, Plaintiff in Error,

vs.

MICHIGAN RAILROAD COMMISSION and FLETCHER PAPER COMPANY, Defendants in Error.

RETURN TO WRIT OF ERROR.

1 *Petition for Writ of Mandamus.*

STATE OF MICHIGAN,
In the Supreme Court:

To the Honorable the Judges of the Supreme Court:

The Petitioner, the Michigan Railroad Commission, shows unto this Honorable Court:

I.

That it is a body politic, and corporate, organized and existing and charged with certain public duties and powers, under Act 300 of the Public Acts of the State of Michigan, of the year 1909, as amended, and that it is a successor to Michigan Railroad Commission, heretofore duly organized and existing under Act 312 of the Public Acts of Michigan, of 1907.

II.

That the Respondent, Detroit & Mackinac Railway Company, is a corporation organized and existing under and by virtue of the general railroad act of Michigan, that it owns and is engaged in operating a railroad entirely within the State of Michigan, with its southern terminus at Bay City, and its northern terminus at Che-
2 boygan, Michigan, together with various branches, switches, and spurs, and that it has been so engaged for upwards of ten years last past, and said Detroit & Mackinac Railway Company is a common carrier, engaged in the transportation of passengers and property by railroad, between points in the State of Michigan, and owns and operates passenger and freight trains for the transportation of passenger- and property.

III.

That on or about the 19th day of January, 1911, the Fletcher Paper Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, maintaining its principal office and place of business in Alpena, Michigan, and there engaged in the business of manufacturing paper, filed with the Michigan Railroad Commission, a complaint against the respondent herein, wherein, among other things, it was set forth that on or about the

9th day of September, 1910, said Railway Company removed or caused to be removed part of the rails from Tubbs Branch, so called, a logging railroad, operated by said Detroit & Mackinac Railway Company, and since that time refused to give service on said Branch, to the great loss and injury of the said Fletcher Paper Company, because it then had a large quantity of new logs, to-wit: 400,000 feet, cut and ready to be hauled out of said Branch, and it had standing, in addition to said saw-logs, so cut, a large quantity, to-wit: 21,250,000 feet of timber, a greater part of which had been killed by forest fires, all of which will appear in said complaint, a copy of which is hereto attached, marked "Exhibit A," and made a part of this petition.

IV.

3 Petitioner further shows that notice was duly served on the said respondent, of said proceedings, and a hearing was had before this petitioner. On behalf of the respondent, no evidence whatever was given on said hearing. This petitioner, the Michigan Railroad Commission, took the matter under advisement, and after investigating and deliberating thereon, they did, on or about the 3rd day of August, 1911, make an order in said proceeding, requiring the said Detroit & Mackinac Railway Company, on or before the expiration of thirty days from the date thereof, to re-lay the rails removed by it from the so-called "Tubbs Branch," or "Martindale Spur," and to accept the shipments offered to it on said Branch by the complainant, the Fletcher Paper Company, and to grant to the said Fletcher Paper Company the same facilities heretofore granted by said Detroit & Mackinac Railway Company to the Churchill Lumber Company, and to such other person, firm, or corporation, as *have* been granted rights of shipment over said "Tubbs Branch," or "Martindale Spur," a copy of which order is hereto attached, marked "Exhibit B," and made a part of this petition, and on the said 3rd day of August, 1911, the said Michigan Railroad Commission filed in said proceedings, its written opinion, containing many of the facts upon which it relied in arriving at its final order, a copy of which opinion is hereto attached, marked "Exhibit C," and made a part of this petition.

V.

Petitioner further shows that service of a certified copy of said order was made upon the said Detroit & Mackinac Railway Company, on or about the 8th day of August, 1911.

VI.

Petitioner further shows that before the expiration of said thirty days, and on or about the — day of August, 1911, James
4 McNamara, Esquire, solicitor for said Detroit & Mackinac Railway Company, secured an extension of time of thirty days, within which said Detroit & Mackinac Railway Company were required by said order to re-lay the rails and re-establish service upon

said "Tubbs Branch." The application for extension was upon the representations made by said solicitor, that Mr. Hawks, the general manager of said railway company, was in Massachusetts, and Mr. McHarg, the president of said railway company, was in Florida, and that he, the said McNamara, wished to consult with one or both, before determining what action should be taken in said proceedings.

VII.

Petitioner further shows that demand has been made by said Fletcher Paper Company upon the said Detroit & Mackinac Railway Company, that it comply with the terms of said order.

VIII.

Petitioner further shows that the respondent, Detroit & Mackinac Railway Company, has not put into effect, the order made by said Michigan Railroad Commission, dated August 3, 1911, and so far as petitioner is aware, the said railway company has made no promise to put the same into effect.

IX.

Petitioner further represents that it is informed and believes that the said Fletcher Paper Company owns 400,000 feet or thereabouts of hemlock saw logs, lying alongside or near to the Tubbs Branch, and that said Fletcher Paper Company also owns a tract of hemlock containing, it is estimated, between 20,000,000 and 21,000,000 feet of hemlock, a large part of which have been killed as a result of the fires which have run through said timbers within recent years, contiguous to said Tubbs Branch, and petitioner is also informed and believes that the hemlock timber depreciates in value after having been killed; not very much the first year, more the second year, and in a much greater ratio in subsequent years.

X.

Petitioner is informed by representatives of said Fletcher Paper Company that it has offered to the Detroit & Mackinac Railway Company to cut and ship out said 20,000,000 feet of logs over said Tubbs Branch and the main line of said railway company during the next three years, and that it has also offered to furnish a bond to said railway company with satisfactory sureties in a sum equal to the cost of relaying said rails, conditioned that it will pay all the cost of re-laying said rails, with interest from the date that the money may be expended if the said railway company will forthwith re-lay said rails as soon as practicable and resume the transportation of the said logs of the Fletcher Paper Company in the usual manner and with usual dispatch and at freight rates established or to be established by said railway company, as modified by this commission, if the said order of the commission is reversed by the Wayne circuit court or by the supreme court if the case is appealed.

XI.

Petitioner further represents that it is informed and believes that there is no other practicable way of transporting said logs to market, save over Tubbs Branch, except at a price which would be practically prohibitive.

6 XII.

Petitioner therefore charges, on information and belief, that the loss to the said paper company, if said timber is not cut and hauled, will be very great, if not irreparable, and that the railway company will sustain no loss if the order of the commission is forthwith put into effect, and that therefore in the balancing of equities this petitioner submits to this honorable court that the order of this commission so made in this case should in equity and good conscience be put into force and effect.

XIII.

Petitioner further shows that an application was filed and an order to show cause was granted by this court in October, 1911, directed to the said respondent, why a mandamus should not issue to compel the respondent to put into force and effect the said order, but such application was made upon the theory that no bill had been filed to review such order and it was afterwards discovered that a bill of complaint had been seasonably filed by respondent in the Wayne Circuit court.

Your petitioner therefore prays that an order to show cause may issue against the said respondent, Detroit & Mackinac Railway Company, requiring it to show cause why a peremptory mandamus should not issue against it, requiring it to make effective the order made by the Michigan Railroad Commission, dated August 3, 1911, and it further prays that peremptory mandamus may issue against the said respondent, Detroit & Mackinac Railway Company, compelling it to put in force the said order to relay the said rails on the said "Tubbs Branch," and to accept shipments offered to it on said Branch by the Fletcher Paper Company, and to grant to the said Fletcher Paper Company the same facilities heretofore granted by said De-
7 troit & Mackinac Railway Company to the Churchill Lumber Company, and to such other person-, firm-, or corporation- as have been granted rights of shipment over the said "Tubbs Branch," or "Martindale Spur."

And for such other and further relief as to the court shall seem meet.

STATE OF MICHIGAN,
County of Ingham, ss:

C. L. Glasgow, being duly sworn, deposes and says that he is a member of the Michigan Railroad Commission, and has been such since the organization of such commission, under the Act of 1907, and that he is familiar with the matters referred to in the foregoing

petition; that he has read the foregoing petition, and knows its contents, and that the allegations contained in paragraphs, numbered I, II, III, IV, VI and VIII are true, of his own knowledge, and he further says that the allegations contained in the other paragraphs of said petition, namely V, VII, IX, X, XI and XII are true to the best of his knowledge, information and belief, and he has every reason to believe that they are true.

C. L. GLASGOW.

Subscribed and sworn to before me this 9th day of August, A. D., 1912.

SAM'L D. PEPPER,
Notary Public in and for Ingham County, Michigan.

My commission expires October 12, 1912.

8 EXHIBIT A.

STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

FLETCHER PAPER COMPANY
vs.
DETROIT & MACKINAC RAILWAY COMPANY.

The petition of the above named Fletcher Paper Company respectfully shows:

1. (State occupation and place of business.) Manufacturer of paper, Alpena, Michigan.

2. That the above named railway company is a common carrier, engaged in the transportation of persons and property by railroad between points in the State of Michigan.

3. That (here state concisely the matters intended to be complained of, numbering each succeeding paragraph.)

The Churchill Lumber Company provided the right of way, constructed the grade and placed ties belonging to them on a branch leaving the main line of said railway at a point known as Case, Michigan, and extending in a southerly direction a distance approximately five miles to the end of the Tubbs Branch. The said railway laid the steel on said branch, which steel they now own and they have continuously operated said branch by hauling logs over it for the Churchill Lumber Company, the Fletcher Paper Company and the Lobdell-Churchill Company, from the time it
9 was completed, until on or about the eighth day of September, nineteen hundred ten.

4. That said branch, above referred to, is known as the "Tubbs Branch" or "Martindale Spur," and is so designated in the published freight tariffs of said railway, which tariffs are in the files of the Michigan Railroad Commission (D. & M. Ry. M. R. C. No. 277.)

5. That said Fletcher Paper Company, on or about the third day of August, nineteen hundred ten, purchased from said Churchill Lumber Company, all its rights, title and interest in the right-of-way of said Tubbs Branch or Martindale Spur, and is now the owner of same.

6. That said railway, on or about the ninth day of September, nineteen hundred ten, removed, or caused to be removed, part of the rails from said branch, near the switch connecting same with main line, and since that time has refused to give service on said branch.

7. That said Fletcher Paper Company now has 100,000 feet of logs banked, ready to ship, on said branch, and has cut and ready to haul to said branch 300,000 feet of logs.

8. That said Fletcher Paper Company has standing timber tributary to said branch to the amount of 21,250,000 feet, and that 5,000,000 feet of the same is dead timber, killed by forest fires of 1908, and must be utilized within a short time to prevent decay and total loss.

9. That said Fletcher Paper Company purchased said right-of-way in good faith and as a means of transportation for its raw material to Alpena, Michigan, expecting that said railway would operate said branch the same as previously, and under same conditions as other branches of the same class are now being operated by said railway.

10. That said railway shows Tubbs Branch or Martindale Spur in its published tariff on logs to Alpena, Michigan, on file with the Michigan Railroad Commission, which tariff is D. & M. Ry. M. R. C. No. 277, Commissioners' Progressive Number 15,095.

11. That said Fletcher Paper Company desires to ship logs from said Tubbs Branch or Martindale Spur to Alpena, Michigan, and that great harm and damages will result to said Fletcher Paper Company if said railway continues to refuse to transport said logs.

12. Said railway by its refusal to perform the services required of a common carrier in the State of Michigan, is violating Act No. 300 of the Public Acts of 1909, particularly Section 3 (A, B, and C) and Section 8.

Wherefore complainant prays that the aforesaid railway company be required to answer the charges herein, and that after due hearing and investigation an order be made commanding said railway company to cease and desist from said violations of the acts referred to in said petition and for such other and further order as the commission may deem necessary and just in the premises. (Prayer may be varied so as to ask for the ascertainment of lawful rates or practices, and an order requiring the carrier to conform thereto.)

Complainant further prays that said railway be required to transport logs from said Tubbs Branch or Martindale Spur, to Alpena, Michigan, in accordance with its published tariff, M. R. C. No. 277, or any subsequent issue of said tariff.

Dated at Lansing, Michigan, this 18th day of January, A. D. 1911.

FLETCHER PAPER COMPANY,
Per FRANK W. FLETCHER,
President, Complainant.

11 EXHIBIT B.

STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

Session of the Michigan Railroad Commission Held at Its Offices, in the City of Lansing, on the 3rd Day of August, A. D. 1911.

D-163.

FLETCHER PAPER COMPANY, Complainant,
vs.
DETROIT & MACKINAC RAILWAY CO., Defendant.

This matter having come on to be heard upon complaint and answer, and proofs having been taken before the commission, and the said proofs and briefs of the respective parties having been duly considered;

It is ordered, that the said defendant, the Detroit & Mackinac Railway Company, be, and is hereby required on or before the expiration of thirty days from the date hereof, to re-lay the rails removed by it from the so called "Tubbs Branch," or "Martindale Spur," and to accept the shipments offered to it on said branch by the complainant, the Fletcher Paper Company, and to grant to the said Fletcher Paper Company the same facilities heretofore granted by said Detroit & Mackinac Railway Company to the Churchill Lumber Company, and to such other person-, firm- or corporation- as have been granted rights of shipment over said "Tubbs Branch," or "Martindale Spur."

C. L. GLASGOW, *Chairman.*
G. W. DICKINSON, *Commissioner.*
LAWTON T. HEMANS, *Commissioner.*

12 EXHIBIT C.

STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

D-163.

FLETCHER PAPER COMPANY, Complainant,
vs.
DETROIT & MACKINAC RAILWAY CO., Defendant.

Appearances:

Frank W. Fletcher, for complainant.
James McNamara, attorney for defendant.

Opinion.

By Commissioner HEMANS:

The facts disclosed by the complaint, answer and proofs in the above entitled matter, are as follows:

In the year 1905, the Churchill Lumber Company, of Alpena, was the owner of a tract of timber lands, located in Presque Isle County, extending some five miles south of Case, a station on the main line of the Detroit & Mackinac Railway, the defendant herein. The owner, desiring to cut the timber, effected an arrangement with the defendant for railroad facilities, whereby the logs could be transported to Alpena. The contract which the parties made was a verbal one, providing in substance that the Churchill Lumber Company was to procure a right-of-way from the main line of defendant company to and through the timber lands. It was to grade the right-of-way and place the ties, and the defendant railway was to
13 place its rails thereon, and haul the forest products to the lumber company's place of manufacture. The agreement was fully consummated, and the road placed in operation during the year 1905. It has since been known as the "Tubbs Branch," or "Martindale Spur."

It is important to note that the contract, or agreement by which this particular branch road was constructed, was not exceptional in character, but that both as to its form and provisions it was in keeping with the custom that was then and is still followed by the defendant, and by such other roads as engage in the transportation of forest products from the places of their severance to the places of manufacture. The magnitude of the lumbering operations, the great extent of timber tracts required to keep mills running, and economic operation have necessitated the construction of branches and spurs from the main line of such roads which traverse the timber sections into the adjacent forests. In many instances, such roads have been constructed by the lumber companies, are private in character, and are by the statutes creating this commission, excepted from its supervision or control. In other instances, as in this case, the branches have been both constructed and operated as appendages to main line. In such cases, as the evidence discloses, it is the custom of both the defendant and other railroads, in the sections, to construct such spurs and branches into the timber tracts; the roads requiring the lumbermen to procure the right-of-way, to make the grade and place the ties, while it places the rails and transports the woodmen's harvest. These agreements between carrier and lumbermen have been quite generally left in parol, but the evidence offered by the defendant suggests nothing in modification of the claimed terms of such construction, except that it was the custom of the defendant before entering into such agreements to ascertain that the shipper had timber contiguous to a proposed branch equal to at least two million feet per mile of road to be constructed.
14 The construction of the "Tubbs Branch," so far as the defendant participated in it, and its subsequent operation by

it, was therefore not an isolated case, but one of many of like character. The branch was ultimately constructed at a total length of something more than five miles. There were several proprietors owning timber contiguous to the branch. The Churchill Lumber Company, at whose instance the branch was constructed, owned from twelve to fourteen million feet. There were other extensive holdings by the Lobdell & Churchill Company, of Onaway, Embury-Martin, of Cheboygan, while the complainant was the owner of more than twenty-one million feet, the transportation of which was to be facilitated by the branch in question.

Between the establishment of the branch and the 8th of June, 1910, the Churchill Lumber Company cut and shipped out all of its timber contiguous to the Tubbs Branch, and on the date last mentioned apprised the defendant railway company of this fact, and requested the removal of the rails from the right-of-way. At this time the complainant, and the Lobdell & Churchill Company had camps actively engaged in lumbering operations on their respective properties, and were shipping considerable quantities of logs over the branch, on the published tariffs of the defendant company.

The records of this department disclose that from the creation of the department, the defendant through its public tariff files, has recognized this branch as a part of its general transportation system. (See M. R. C. No. 76, M. R. C. No. 250, M. R. C. No. 265, M. R. C. No. 274, M. R. C. No. 277, M. R. C. No. 279, M. R. C. No. 303.) The proofs disclose that under such tariffs, during a period of three years previous to the arising of the difficulty in question, the complainant offered and had transported over the Tubbs Branch to Alpena, logs to the extent of one million, three hundred thousand feet, while other extensive shipments were likewise made by the Lobdell & Churchill Company, and the Embury-Martin Company.

During the year 1908, forest fires killed between five and six million feet of timber belonging to complainant adjacent to the branch in question, and in the winter of 1909 and 1910, complainant began preparation for the cutting of this and other portions of the tract. Notwithstanding the notice of the Churchill Lumber Company, of June 8th, above referred to, the defendant continued to transport the logs of complainant, and on August 3, 1910, the complainant acquired from the Churchill Lumber Company for a consideration of four thousand dollars, all the right of the latter concern to the right-of-way and ties of the Tubbs Branch, so that so far as the physical property of the road was concerned, the complainant thereafter stood in the same relation to it that the Churchill Lumber Company had occupied, and in the same relation that all other companies stand to railroad branches for which they have furnished the right-of-way and ties, and the railroad companies have furnished rails. The Churchill Lumber Company at once, upon effecting the sale to complainant, by letter apprised defendant of the fact of such sale, and requested that the rails be not removed. The defendant company thereafter continued to accept shipments from complainant over the branch until the 9th day of September

following. Between August 3, and September 9, more than one hundred thousand feet of logs being transported. On the latter date, the defendant without notice to complainant, took up about one-half mile of rail from the branch, beginning about one-half mile from the main line, and extending nearly to the skidway upon which the complainant at the time had approximately one hundred and forty-five thousand feet of logs, skidded and ready for shipment, while three hundred and seventy-five thousand feet
16 more were upon the rollways in the adjacent forest. On the very forenoon of the day the rails were torn up shipments were made for complainant under tariffs that were then and that continued thereafter in force. The complainant thereafter made a formal request that cars be placed and his shipments accepted. With this request the defendant refused to comply, leaving the rails piled by the right-of-way, and insisting that the tariff applicable to the branch had been cancelled by eliminating the same from the station list. As under the law, tariffs cannot be cancelled except upon notice to this commission, there is no force to this contention.

Upon being apprised of the action of the defendant in removing the section of rail from the branch, the complainant filed a bill of complaint against defendant in the circuit court for the county of Alpena in chancery. The bill sought to enjoin the defendant from removing further rail from the branch, and to compel it to replace those already removed, and to accept the shipments offered by complainant. While the above cause was pending, complaint was filed with this commission. At the hearing, the defendant offered the record of the proceedings in the Alpena circuit court in chancery, as a bar to the proceedings herein. The decree in the chancery case had not at that time been entered, and has subsequently been added to this record. The decree dismisses the bill of complaint, and provides in terms that it is "without prejudice to complainant to file its petition for relief with the Michigan Railroad Commission." Even as between courts bound by the strict rules of legal procedure, such a decree could not be effectually pleaded in bar of some subsequent action, unless it appeared that the latter case was identical with the former case upon the facts presented and that the power of the courts to grant relief was the same in both instances.

Story Equity Pleadings, 793;
17 County of Mobile vs. Kimball, 102 U. S., 691;
Newberry vs. Ruffin, 102 Va. 73.

Numerous cases could be cited giving far greater scope to the words "without prejudice" than is contended for them here. The court, in the case of O'Keefe vs. Irvington Co. 87 Md. 199, among numerous citations quoted approvingly from N. Pac. R. R. Co. vs. St. P. R. R. 47 Fed. 536, to the effect that when the qualifying words "without prejudice" are used, the effect is "like a nonsuit in a common law action." We are therefore clearly of the opinion that the decree in the chancery court can in no manner be said to be a bar to this proceeding, and however familiar the two proceedings may be upon the precise facts involved, there is a marked dissimi-

larity in the powers of the court and this commission, in the application of a remedy to any wrong which the facts may disclose.

Prior to action by this commission in the premises, the power of the chancery court was, and still is, limited to the enforcement of those clear legal or equitable rights embraced within the general equity jurisdiction of the court. Needless to say, this jurisdiction does not comprehend the power to decree regulations that are administrative in character, such as the legislature has delegated through the act creating the Michigan Railroad Commission. While the courts, through a bill in chancery, have certain jurisdiction over the orders of the commission, they may not, in the first instance, pass upon the reasonableness of maximum rates of charges for the transportation of property, or upon the innumerable questions growing out of the rate making power, and the preventing of discrimination.

Section 22, of Act No. 300 of the Public Acts of 1909, being an act which among other things defines the powers and duties of the Michigan Railroad Commission, provides:

18 "Upon complaint in writing of any person, firm or corporation or association, or of any mercantile, agricultural or manufacturing society, or of any body politic of municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property or any service in connection therewith, is in any respect unreasonable or unjustly discriminatory, or that any service is inadequate, the commission shall notify the common carrier complained of—"

After providing for hearing and investigation, the section further provides:

"If, upon such investigation, the rate or rates, joint rate or rates, fares, charges or classifications, regulations, practice or service complained of shall be found to be unreasonable, inadequate, or unjustly discriminatory, the commission shall have power to and it shall determine and by order fix and order substituted therefor, such rate or rates, joint rate or rates, fares and charges, as is or are just and reasonable, and which shall be the maximum to be charged in the future, and such classifications, regulation, practice or service as is or are just, reasonable and adequate, and which shall be imposed and followed or service rendered in future in lieu of that found to be unreasonable, inadequate or unjustly discriminatory, and in either case the commission shall make an order that the common carrier cease and desist from such violation and shall conform to the regulation and practice so prescribed."

None of the foregoing powers are committed to the jurisdiction of the chancery court. That court, in this controversy, exercised its powers in determining the property rights of the parties. This commission exercises its powers in determining the reasonableness or unreasonableness of the discrimination, regulation and practices complained of.

In seeking for guidance in determining the extent and limita-

tions of its powers, this commission naturally looks to the
19 decisions of the Interstate Commerce Commission. The act to regulate commerce, under which that body exercises its authority, by its terms limits the commission to the prescribing of just and reasonable rates, but without the broad language of the Michigan statute. The Interstate Commerce Commission has said, in speaking of its powers, "We think that the commission has full power to remove unjust discrimination resulting from a rule or practice, as well as that resulting from a rate." (Overbacker Coffee Co. vs. Southern Ry., 18 I. C. C. Rep. 570.)

In another case they have very truly said, "There is no more insidious and effective way by which a carrier may discriminate between its shippers than through a regulation or practice that denies to them the equal enjoyment of its facilities." (Rail & River Coal Co. vs. B. & O. R. R. 14 I. C. C. Rep. 86.)

As a few instances of what the Interstate Commerce Commission has declared to be discriminations, it is of interest to note the following:

"The practice of a railroad allowing more free time for the unloading of cars in one city than in another." (Lynch & Reed vs. B. & O. R. R. 18 I. C. C. Rep. 38.)

"For a railroad to build and rent an elevator for a nominal rental to an individual in one city, while it requires the individuals of a neighboring city to provide its own." (Brooks-Rauch Mill & Elevator Co. vs. M. P. Ry. Co. 17 I. C. C. Rep. 158.)

"For a railroad to bear a part of all of a cartage charge upon freight brought to it by distant shippers, while refusing to bear no part of the cartage charge from shippers near at hand." (Stone & Carter vs. D. G. H. & M. Ry., 3 I. C. C. Rep. 613.)

The first chairman of the Interstate Commerce Commission, the distinguished Thomas M. Cooley, speaking for the commission in
the case of Kruse vs. Richmond, Danville R. R. Co., 1 I. C. C.
20 Rep. 426, said: "Discrimination must consist in the doing for or allowing to one party or place what is denied to another."

It will hardly be contended that the action of the defendant, in placing its rails upon the ties and right-of-way of the Churchill Lumber Company, and upon the right-of-way and ties of other lumber companies, and granting the use of its railway facilities as they have use for them, and then ruthlessly tearing out the rails and refuse the same facilities to complainant, does not come clearly within this definition. In the exercise of its franchise, it is the duty of a railway company to so adjust its tariffs and so regulate its practices that unjust discrimination shall not result. The defendant, therefore, may not refuse to one shipper the facilities which it grants freely to another under conditions which are practically identical.

It is the opinion of the commission that the defendant company should re-lay the rails removed by it from the so called "Tubbs Branch" or "Martindale Spur" and accept for transportation on said branch the shipments tendered by complainant; that said tracks

should be relaid on or before thirty days from this date, and an order to this effect will be entered.

C. L. GLASGOW,
Chairman.
G. W. DICKINSON,
Commissioner.
LAWTON T. HEMANS,
Commissioner.

EXHIBIT D.

STATE OF MICHIGAN,
County of Alpena, ss:

William H. Le Roy, being duly sworn, deposes and says,
21 that, on the forenoon of August 8th, 1911, he personally served a copy of order of the Michigan Railroad Commission in regard to re-laying of Tubb's Branch, on the Detroit & Mackinac Railway Company, upon its agent, H. M. Reeves, at Alpena, Michigan.

(Signed) WM. H. LE ROY.

Subscribed and sworn to before me this 8th day of August, 1911.
WOOLSEY N. HUNT,
Notary Public for Alpena Co.

My commission expires October 31, 1911.

STATE OF MICHIGAN:

In the Supreme Court.

MICHIGAN RAILROAD COMMISSION, Relator,
vs.
THE DETROIT & MACKINAC RAILWAY CO., Respondent.

Answer.

The Detroit & Mackinac Railway Company in response to
22 the order to show cause, granted in this case, answers the petition of the relator paragraph by paragraph, and says:

I.

This respondent denies that the Michigan Railroad Commission is a body politic and corporate, but it admits that it is a board of executive officers existing under Act 300 of Public Acts of 1909.

II.

This respondent admits that the Detroit & Mackinac Railway Company is a corporation organized and existing under the general railroad laws of this state; that it owns and is engaged in operating

a railroad entirely within the State of Michigan, running from Bay City to Cheboygan, with various branches, switches and spurs, and that it has been so engaged for ten (10) years and more last past; that it is a common carrier of passengers and freight and owns and operates passenger and freight trains from Bay City to Cheboygan, and on such of its branches as are operated as a part of its public railway.

III.

This respondent admits that on the 19th day of January, 1911, the Fletcher Paper Company, a domestic corporation, filed with the Michigan Railroad Commission, a complaint against the Detroit & Mackinac Railway Company, a copy of which complaint is annexed to the petition of the relator in this cause as Exhibit A.

IV.

This respondent admits that notice of said petition was served on it and a partial hearing was had thereon, but this respond-
23 ent denies that there was a full hearing and shows that this respondent was not given an opportunity to introduce evidence on said hearing; that the case came on to be heard before the Michigan Railroad Commission on the 24th day of March, 1911; that testimony on behalf of the Fletcher Paper Company was introduced, and this respondent produced before said railroad commission, a certified copy of the record and proceedings in the case of the Fletcher Paper Company against the Detroit & Mackinac Railway Company in the Circuit Court for the County of Alpena, in chancery; that this respondent contended that the proceedings in said case were a bar to any proceedings before the Michigan Railway Commission, and that said commission had no jurisdiction of the complaint made to it by the Fletcher Paper Company; that this question of jurisdiction was submitted to the commission with the understanding and agreement on the part of the commission that in case they held that the proceedings in the Alpena circuit —, in chancery, were not a bar, that this respondent should have an opportunity to introduce evidence in support of the answer which it had filed to the said complaint of the Fletcher Paper Company; that a copy of said answer is hereto annexed to this answer as Exhibit A hereof; that the official stenographic report of the proceedings had before the said commission on said partial hearing, the same being a part of the records in this case of the Michigan Railroad Commission, is hereto annexed as Exhibit B of this answer.

This respondent further answering the fourth paragraph of the petition of relator, says that the Michigan Railroad Commission in violation of the agreement and understanding with this respondent that it should have an opportunity to introduce evidence, did on the 3rd day of August, 1911, file an opinion and grant an order, copies of which are annexed to the petition of the relator as Exhibits B and C.

24 V.

This respondent admits that a certified copy of said order of the railroad commission of August 3rd, 1911, was served upon it upon the 8th day of August, 1911.

VI.

This respondent admits that an extension of the time fixed by said order for compliance therewith was granted as stated in the sixth paragraph of the petition of the relator.

VII.

This respondent admits a demand has been made by the Fletcher Paper Company upon the Detroit & Mackinac Railway Company that it comply with the terms of said order, but this respondent shows that it has declined to comply with said order for reasons hereinafter fully stated.

VIII.

This respondent admits that it has not put said order into effect, and it has made no promise that it will put the same into effect.

IX.

This respondent admits that the rails upon said Tubbs Branch were laid by this respondent, and that the original right of way was acquired by the Churchill Lumber Company, and that the Churchill Lumber Company and this respondent had the exclusive use of the said Tubbs Branch; but this respondent shows that the use of said branch was controlled by the Churchill Lumber
25 Company, and that this respondent made no use of the same except subject to the direction of said Churchill Lumber Company.

X.

This respondent denies that the said Tubbs Branch was a part of the railroad system of this respondent over which logs and other forest products were transported by this respondent for the public generally, and it denies that the end of the said Tubbs Branch was treated as a station in the published tariffs of said respondent for merchandise generally or otherwise.

This respondent further shows that it never did any business as a common carrier on said Tubbs Branch and that the said Tubbs Branch always was and still is a mere private spur for the use of the Churchill Lumber Company and the Michigan Railroad Commission has no jurisdiction over the same.

XI.

This respondent admits that for fifteen years and upwards it has been its practice to enter into contracts with timber operators for the construction and operation of private logging branches; that the

timber owners or operators would furnish and own the right of way, do the grading and furnish the ties, and this respondent would furnish and lay the iron and do what ballasting was needed; that said private spurs or branches never became a part of the public railway of this respondent, and no public business as a common carrier was ever carried on thereon; that the rates for the hauling of logs were either fixed by the private contracts aforesaid or left to such reasonable compensation as this respondent was entitled to receive for the private service so rendered; that the rates to be charged depended upon the amount of timber to be hauled,
26 and the length of time the branch was to be maintained for the purpose of hauling the timber; that this respondent is ready and willing to enter into a reasonable private contract with the Fletcher Paper Company for the restoration of said Tubbs Branch. This respondent respectfully submits that the terms to be agreed upon are a matter of private contract, and that the Michigan Railroad Commission has no jurisdiction over the same.

XII.

This respondent admits that an application was made to this court in October 1911, and an order to show cause was granted requiring this respondent to show cause why a mandamus should not issue to compel it to put into force and effect the said order of the Railroad Commission; but this respondent shows that it filed an answer to said petition in response to said order to show cause; that it appeared by said answer and it is now again alleged to be the fact that on the second day of September, 1911, this respondent filed a bill in the Circuit Court for the County of Wayne, in Chancery, to review, vacate and annul the said order of the Railroad Commission of August 3rd 1911; that a subpœna was issued on said bill and the same with a copy of the bill of complaint, was duly served on the Michigan Railroad Commission, and a copy of said bill of complaint and subpœna and proof of service thereof is annexed to this answer as Exhibit C. This respondent further shows that the Railroad Commission filed an answer to said Bill of Complaint and thereupon the case being at issue, it was referred to an examiner to take the proofs in the case, and counsel for the parties have arranged to commence the taking of such proof at Alpena, on the 16th day of November, 1912; that said cause is still pending and undisposed of.

27 This respondent further shows that until proofs are taken in said cause and the case is heard and submitted to the Circuit Court for the County of Wayne in Chancery, it will have had no opportunity to introduce evidence and to be heard on the facts on which the order of the Railroad Commission is based, or to disprove the allegations of the complaint of the Fletcher Paper Company to the Commission, Exhibit A of the petition of the relator, or to maintain and prove the allegations of its answer to said complaint, Exhibit A of this answer, pp. 9-15; that this respondent has been advised and respectfully submits that *the* grant the Writ of Man-

damus prayed would be a violation of the due process of law and equal protection of the laws, clauses, of the 14th Amendment of the Constitution of the United States.

XIII.

This respondent further answering the petition of the relator shows unto the court that all the allegations contained in the answers and pleadings of this respondent in the circuit court for the county of Alpena and before the Michigan Railroad Commission and in the circuit court for the county of Wayne, are true, and the plaintiff affirms their truth the same as if said allegations were herein repeated.

XIV.

This respondent further answering the petition of relator, says that the Tubbs Branch, so called, was built by the Churchill Lumber Company; the right of way was procured and was owned by that company, and it, also, did the grading and furnished the ties;
that the Tubbs Branch is 5 miles 3,552 feet long and cost the
28 Churchill Lumber Company $8,523.34; that the Detroit & Mackinac Railway Company furnished and laid the steel and ballasted the branch; that the rails used were second hand or worn rails taken up from the main line and used on the branch; that the ballasting was crude, and the whole construction of a temporary nature; that the rails used were of the value of $1,775.89, and the labor of laying the rails and doing the ballasting cost $9,424.24, making the total cost to the D. & M. $11,200.13 and the cost to both parties a little less than $20,000 for over 5½ miles of construction; that the Churchill Lumber Company permitted other timber operators to make use of the Tubbs Branch, but it charged them fifty cents a thousand for so doing it; that no freight or passenger business was conducted on said branch, and there was no population near said branch to be served; that the only use ever made of said branch was to haul flat cars loaded with logs, use being made of a locomotive of light weight, operated at a slow rate of speed and without any regular service, empty flat cars being taken in when needed, and taken out when loaded, the loading being done by the Churchill Lumber Company, or by the other operators who were permitted to use the branch; that said branch was constructed with the understanding and agreement that when the timber of the Churchill Lumber — was exhausted the branch would be taken up; that the agreement and understanding between the Churchill Lumber Company and the Detroit & Mackinac Railway Company was that the rates on logs from off the Tubbs Branch to Alpena should be $2.75 per thousand on hemlock logs and $3.75 per thousand on hardwood logs, and said rates were paid by the Churchill Lumber Company until it requested the railroad company to make a uniform rate on logs, which the railroad company did by making the uniform rate
from the Tubbs Branch to Alpena $3.25 per thousand; that
29 whatever may be the facts as to other logging branches connected with the public railway of this respondent, the Tubbs

branch has always been a *more* private tram-way, and in no respect whatever within the jurisdiction of the Michigan Railroad Commission.

XV.

This respondent further answering shows that the timber lands claimed to be owned by the Fletcher Paper Company are intersected by the — timber thereon is tributary to the Onaway Northern Michigan Railroad, which connects with the respondent's main line at Onaway; that it would cost the Fletcher Paper Company but little more to transport its said timber to Alpena via said railroad than by the Tubbs branch, and the object and purpose of the Fletcher Paper Company is to saddle that expense onto this respondent by compelling it to restore and maintain the Tubbs branch without compensation.

XVI.

This respondent is advised and submits that said order of the Michigan Railroad Commission of August 3, 1911, if enforced, would deprive this respondent of its property without due process of law, and deny to it the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

All of which matters and things this respondent is ready to ever maintain and prove at such time and manner as the court may direct, and if any question is made concerning the truth of the allegations contained in this answer or made by the respondent in the accompanying exhibits, the respondent prays that issues may be framed thereon and the facts duly determined according to the rules and practice of this court.

DETROIT & MACKINAC RAILWAY CO.,
By GEO. M. CROCKER,
Second Vice-President and Auditor.

JAMES McNAMARA,
Solicitor for Respondent.
FRED A. BAKER,
Of Counsel.

(Verified in usual form.)

has been advised that the complainant purchased certain interests in the "Tubbs Branch;" as to the extent of said purchase or title which this complainant acquired in the Tubbs Branch, this defendant is not now nor has it ever been by said complainant advised. And the defendant asserts that the complainant at no time negotiated with it for the purchase of any interest or interests which this defendant had in and to said branch, or the steel rails or other property belonging to this defendant, as a part of said branch; and that said complainant has never acquired any interest, right or title to said rails or to any other property of interest in and along said Tubbs Branch which this defendant is the owner of now or has at any time heretofore been the owner. That this defendant was not advised by said complainant that it had made any purchase of the interest of the Churchill Lumber Company in said branch until after said branch had been disconnected with the main line of defendant's railroad and service thereon discontinued.

This defendant further says that after learning of said purchase on the part of the complainant and, after the disconnection and discontinuance of said Tubbs Branch, this defendant through its Vice-President and General Manager, Mr. J. D. Hawks, caused to be sent through the mail the following letter, addressed to said complainant:

36 "DETROIT, MICH., Sept. 12th, 1910.

Fletcher Paper Co., Alpena, Mich.

DEAR SIRS: I understand that you have bought from the Churchill Lumber Company of Alpena "the right to the exclusive use and control of the land now used as a roadbed for what is known as the Tubbs Branch of the D. & M. R. R."

Pending some settlement as to how this branch is to be used in the future, I have had part of the branch taken up. Is it your wish that the balance of the branch be taken up?

If the branch is to remain, do you expect to deed the right of way to this company together with the right to other shippers to reach the track and to bank logs for forest products on the right of way and adjacent thereto?

If we rebuild the track, how long would you expect it to stay down, and what rate would you expect to pay on logs to Alpena?

If it is your intention to operate the Tubbs Branch yourself, I would be pleased to rent you the rail now on the branch.

Yours truly,

J. D. HAWKS,

Vice-President and Gen'l Mgr."

To which letter said complainant has never made any reply and the same remains unanswered up to and including the present time.

4. In answer to paragraphs 7 and 8 of complainant's bill of complaint this defendant says that it has no knowledge of the amount of timber owned by said complainant adjacent to or accessible to said Tubbs Branch, and has never been consulted by said complainant with reference thereto. That this defendant has never been called upon by complainant to make arrangements for the hauling
37 of any timber which it might have adjacent to or within the vicinity of the Tubbs Branch; has never negotiated with

"ALPENA, MICH., June 8, 1910.

"Churchill Lumber Co., Mr. C. W. Luce, Gen'l Supt. D. & M. Ry., East Tawas, Mich.

DEAR SIR: Through Mr. W. O. Derry we have just sold to settlers 800 acres of our cut over lands through which the Tubbs Branch runs, and have prospective buyers for all our cut over lands in this and other sections.

The parties to whom we have sold the 800 acres do not want your track on their lands and insist on our having same re-
34 moved before they will make final payments for same and accept their deeds.

As we are all through removing timber on the Tubbs Branch and in view of the above sales, we request that you remove your rails as soon as possible so that we can complete our sales of these lands.

Kindly advise us how soon you can do this, and oblige.

Yours very truly,

CHURCHILL LUMBER CO.,
FRED A. KIMBALL,
Pres't and Mgr."

On receipt of the foregoing notice, the General Superintendent forwarded the same to the Vice-President of the Defendant Company with the following notation:

"6/10/10.

Mr. Hawks:

We will take up the track as requested. I believe all logs, cedar, etc., that was got out last winter has been loaded out.

C. W. LUCE."

It was then determined by the officers of the defendant company to remove said track at its pleasure, and, needing a portion of the rails on said track for another branch, it proceeded to and did, on the 9th of September, take up and remove from said Tubbs Branch 2,700 feet thereof, as it had a right to do, and as it was ordered to do by the only company, firm or corporation who had ever acquired any interest or right therein.

(*d.*)

This defendant further alleges that the Tubbs Branch was established in October, 1906, and its length was 5 miles, 3,352 feet, from the end of the so-called "Sanborn Spur" which had before then been established. That the costs of material and labor for putting
35 in the Tubbs Branch was the sum of $11,200.13. That all of said costs were borne by this defendant, and that this defendant has in no wise been recompensed therefor by the complainant. And that complainant never acquired any right, title or interest in said branch or any property pertaining to or belonging to this defendant in connection with said branch so as to in any way dictate the disposition of this defendant's property on the said branch.

3. In answer to paragraphs 5 and 6 this defendant states that it

(*a.*)

The construction of the "Tubbs Branch," referred to in the Bill of Complaint, was under and by virtue of an agreement made by and between the Churchill Lumber Company and this defendant, whereby said Churchill Lumber Company was to procure the right of way for this defendant for such branch, grade and tie the same, ready for the placing of rails thereon by this defendant, for the purpose of taking out logs and forest products owned by said Churchill Lumber Company, at that time lying along or adjacent to said "Tubbs Branch." That this defendant was to place on such roadbed track rails, and take out over such track the logs and other forest products of the Churchill Lumber Company, the latter company agreeing to furnish so many million feet per year as an inducement to build said spur.

(*b.*)

Pursuant to the arrangements recited in paragraph "*a*" the said Churchill Lumber Company proceeded to grade and tie a branch road, subsequently known as "Tubbs Branch," but never acquired for this defendant a right of way other than the implied right to enter thereon by reason of the grading and tying of said track.

That no preliminary steps were ever taken as conditions precedent to the establishment of a branch for the use of the public. That said branch never became a part of the defendant's railroad system whereby it could enforce the perpetual use thereof for the
33 public, and it was recognized by both parties to the original agreement as a track subservient to the mutual use and benefit of the Churchill Lumber Company and this defendant, and to no other person, firm or corporation save by forbearance or mutual indulgence.

(*c.*)

After said Branch was in readiness for use, this defendant proceeded to haul forest products out over such branch belonging to the said Churchill Lumber Company and to other firms or corporations who banked their logs on and along such branch, but never since its construction has the Churchill Lumber Company or any one else procured for this defendant any permanent right of way for such track.

This defendant proceeded to take out forest products for said Churchill Lumber Company until it had hauled all the forest products which said Churchill Lumber Company had at the time said track was placed there in the year 1906 up to June 8th, 1910, when this defendant received from the Churchill Lumber Company a notice in writing, that all of their timber had been removed and that they wanted the track taken from said land. Such notice was in words and language as follows:

EXHIBIT A.

STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

Case No. 5. D-163.

FLETCHER PAPER COMPANY, Complainant,
vs.
DETROIT & MACKINAC RAILWAY CO., Defendant.

The Detroit & Mackinac Railway Company, the above-named defendant, hereby makes this its answer to the bill of complaint filed by the Fletcher Paper Company in the above-entitled cause.

This defendant now, and at all times hereafter, saving and
31 reserving unto itself all benefit and advantage of a demurrer to the above complaint, interposes a plea of a prior suit pending and says that said complainant on the 10th day of September, 1910, in the circuit court for the county of Alpena, in chancery, filed its Bill of Complaint containing substantially the allegations set forth herein against this defendant, and caused an injunction to be issued out of and under the seal of this court directed against this defendant, praying that this defendant might be compelled, by an order of said court, to operate the so called "Tubbs Branch" for the benefit of said complainant and for th same reasons set forth in the bill of complaint filed in this cause; that said defendant filed an answer in the nature of a cross bill, to said Bill of Complaint, and joined issue with said complainant in the circuit court for the county of Alpena; that on the 22nd day of November, A. D. 1910, at the City of Alpena, Michigan, proofs were taken and submitted before Hon. Frank Emerick, judge of the circuit court of Alpena county, aforesaid, in open court, upon the allegations contained in said Bill of Complaint and, after hearing said proofs and the arguments of the solicitors representing the parties, said cause was then and there submitted to the said Circuit Judge, and taken under advisement by him, and that no decision has been rendered thereon; and because said complainant, having heretofore chosen its forum in which to try the issues involved in the complaint in this case, cannot now file a similar complaint, either before the Michigan Railroad Commission or any other court in this state, involving the same issues, until after the adjudication thereof; a copy of which Bill of Complaint and Answer, so filed as aforesaid in the circuit court for the county of Alpena, in chancery, is hereto attached and marked Exhibits "A" and "B" and made part of this Answer. That said defendant claims all benefit and advantage of exception
32 which can or may be had or taken to said Bill of Complaint, and, for answer thereto, says:

1. This defendant admits the matters and things set forth in paragraphs 1 and 2 in said complaint.

2. In answer to paragraphs 3 and 4 this defendant asserts:

this defendant with reference to the amount of timber to be hauled out over and along this said Tubbs Branch per month or per year, or whether said branch should be operated by said defendant for the exclusive benefit of said complainant for one year, or twenty years, or whether it should operate and equip said branch for the exclusive benefit of said complainant to bring down one carload of logs per week, or per month, or whether it should be merely operated at the pleasure, whim or caprice of Mr. Frank W. Fletcher, president of the complainant company.

5. This defendant denies the matters and things alleged in paragraps 9, 10, 11 and 12 of said complaint and asserts that it had the right to remove any and all the rails or other property belonging to it on said Tubbs Branch whenever it pleased itself to do so; that said defendant never owned the right of way or anything in connection therewith, except the rails, upon the so-called Tubbs Branch and that said complainant has made no claim or demand whatever on this defendant respecting said branch so far as defendant's rails and other property thereon is concerned, and that said rails are the exclusive property of this defendant and that said complainant has, nor never has had, any property right or interest therein.

This defendant, the Detroit & Mackinac Railway Company, moves to dismiss the bill of complaint, of the Fletcher Paper Company for the following additional reasons:

First. To grant the relief prayed by said complainant would be to take the private property of the Detroit & Mackinac Railway Company, for the private use of the Fletcher Paper Company,
38 contrary to the due process of law clause of the 14th amendment of the constitution of the United States.

Second. If the use to be made of the property to be taken by the writ or order prayed in this case is to be regarded as taken for a public use, then the same would be taken and condemned without compensation, contrary to the due process of law clause of the 14th amendment of the constitution of the United States.

Third. It appears by the pleadings that the logging branch of the Detroit & Mackinac Railway Company, known as the Tubbs Branch, is essentially private in its nature; that, as to it, the Detroit & Mackinac Railway Company is not a common carrier.

That the construction and operation of these logging branches is not subject to regulation or control by any governmental authority, but depends upon such contracts, express or implied, oral or written, that have been or may hereafter be entered into between each lumberman or timber owner and the railway company.

Defendant therefore asks that said complaint be dismissed with its reasonable costs and charges in this behalf sustained.

DETROIT & MACKINAC RAILWAY CO.,
Per J. D. HAWKS, *Vice-Pres't and Gen'l Mgr.*

JAMES McNAMARA,
General Attorney.

39 STATE OF MICHIGAN:

In the Circuit Court of Alpena.

In Chancery.

To the Circuit Court for the County of Alpena, in Chancery:

Your orator, the Fletcher Paper Company, respectfully shows unto the court:

I.

That it is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan with its headquarters and main office at the City of Alpena, County of Alpena, State of Michigan.

II.

That your orator is operating three (3) mills in the county of Alpena; that said mills are connected and supplied with logs, pulp wood and forest products coming over the railroad tracks of the Detroit & Mackinac Railroad Company, a corporation organized and doing business under the laws of the State of Michigan and operating a railroad from Bay City to Cheboygan with its various branches and spurs; that among the branches that it operates is what is known as the Tubbs Branch, which said branch runs through sections 13-14-23-24-25-35-36 town 34 north of range 2 East and sections 2-3 in town 33 north of range 2 East in the County of Presque Isle, Michigan; that said spur aforesaid connects onto the main line of the Detroit & Mackinac Railroad Company, corporation, defendant herein, at Case, and said defendant herein has for some years immedi-
40 ately just past put out a schedule and tariff rate for the hauling of logs and other forest products from and over the said Tubbs Branch and all points on said branch to the city of Alpena and to the mills operating in the city of Alpena; that in and by said tariff and schedule the said defendant has offered to haul logs and forest products that might be placed upon said track and deliver the same at the rate mentioned in said schedule and tariff; that said schedule and tariff rate on said Tubbs Branch has never been withdrawn or cancelled by the said defendant to the knowledge of your orator and said schedule and tariff rate is now in full force and effect.

III.

Your orator further shows unto the court that it recently purchased for the sum of Four Thousand Dollars ($4,000) the banking grounds on either side of the said Tubbs Branch from the point of its connection with the main line of the Detroit & Mackinac Railroad to its terminus, together with the right of way upon which said Tubbs Branch is situated; that said landings and right of way aforesaid was purchased by your orator from the Churchill Lumber Company for the reason that your orator had some thirty million (30,000,000) feet of timber adjacent to the said Tubbs Branch, accessible

only over said Tubbs Branch, and in view of the fact the Churchill Lumber Company had completed its operations upon said Tubbs Branch and were about to have the same removed, which removal of said branch would have done your orator an irreparable injury.

IV.

That after your orator had purchased the landings and right of way aforesaid your orator commenced operations to cut
41 said timber and place same on its said landings on the Tubbs Branch and that said operations are now at work and a portion of said landings for shipment and the balance thereof is being cut for shipment over said Tubbs Branch.

V.

Your orator further shows unto the court that on the 9th day of August, 1910, the Churchill Lumber Company, who were the original owners of the said landings and right of way aforesaid, notified the said defendant that the said landings and right of way had been sold to your orator and at the same time, and in the same communication rescinded any and all former notification to the Detroit & Mackinac Railway Company to remove the rails on said Tubbs Branch; that said notification was received by the said defendant and an acknowledgment made thereof on the 11th day of August, 1910.

VI.

That the said defendant well knew that your orator had purchased the landings and right of way aforesaid and *were* operating extensively thereon and owned large tracts of timber that necessarily must come out over the said Tubbs Branch. Yet disregarding its schedule and tariff rates thereon and its invitation to shippers to place logs, forest products and other commodities on the landings of said Tubbs Branch for shipment. The said defendant now threatens to remove the rails on said Tubbs Branch and disconnect the same from the said line of said railroad, thus rendering it impossible for your orator to procure for its mills aforesaid its said logs and
42 forest products situated as aforesaid, and your orator is informed and verily believes that the Detroit & Mackinac Railway Company now have a crew of men removing the rails on said spur and is informed and verily believes that a portion of said rails have been removed.

VII.

Your orator further shows that if the said Detroit & Mackinac railroad are permitted to tear up said track that your orator will be unable to get *his* said logs and forest products, and the removal of said track will render such logs and forest products virtually worthless and will do your orator an irreparable injury.

For as much therefore as your orator is without remedy, except in a court of equity, your orator prays for the following relief:

1. That the said defendant, the Detroit & Mackinac Railway Com-

pany, shall a true and perfect answer make unto this bill and to each and every allegation therein, answer under oath being expressly waived.

2. That said defendant, the Detroit & Mackinac Railway Company, be restrained from taking up its steel and rails on said Tubbs Branch and be enjoined to continue to operate said spur and place cars for loading of products aforesaid of said complainant and to haul said products out on said spur to its main line and on its main line and to deliver the said forest products of complainant at its mills in the county of Alpena as designated at time of * * *

3. That a temporary injunction be issued pursuant to this prayer and that said temporary injunction be made permanent.

4. And that your orator may have such other and further
43 relief as shall be agreeable to equity and good conscience, and your orator will ever pray.

FLETCHER PAPER COMPANY,
P'r FRANK W. FLETCHER, *President.*

F. A. SCOTT,
Solicitor for Complainant.

Business Address, Alpena, Michigan.

(Verified in usual form.)

STATE OF MICHIGAN:

In the Circuit Court for the County of Alpena.

In Chancery.

FLETCHER PAPER COMPANY, a Corporation, Complainant.
vs.
DETROIT & MACKINAC RAILWAY COMPANY, a Corporation, Defendant.

The answer of the defendant to the bill of complaint filed by and on behalf of the complainant respectfully shows unto the court.

I.

The allegations contained in the first paragraph of the bill of complaint are admitted.

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II.

The defendant admits that the complainant has three mills in operation in Alpena county, and defendant believes that such mills are supplied, to some extent, with logs and pulp wood, and forest products transported to such mills over the defendant's road.

Defendant admits that it is a corporation organized and doing business under the laws of the State of Michigan, operating a railroad from Bay City to Cheboygan, with various branches.

Defendant denies that at the time of the exhibition of complainant's bill of complaint on, to-wit, the 10th day of September, 1910, it, this defendant, was operating a branch road known as "Tubbs Branch," running through parts of towns thirty-three (33) and thirty-four (34) North, Range Two (2) East, Presque Isle County, Michigan.

Defendant denies that such branch or spur is connected with the main line of its road at Case so as to be operative.

Defendant admits that until shortly before September 9, 1910, it operated such branch as hereinafter stated, and that on September 9, 1910, such branch went out of commission and has not since been capable of operation.

Defendant admits that prior to August 2, 1910, for a period of some time, a tariff rate for the hauling of logs was in existence, but that after August 2, 1910, no tariff whatever existed relative to the hauling of logs or other forest products on and over such branch.

Defendant denies that part of paragraph two of complainant's bill wherein it alleges that the schedule and tariff rate for hauling logs and forest products on said "Tubbs Branch" had never been withdrawn or cancelled; defendant alleging in this connection that it is unadvised as to the knowledge of the complainant re-
45 specting the withdrawal of such tariff rates but insists that the defendant had as ample means of ascertaining the fact of such withdrawal as it had of ascertaining the fact that such schedule and tariff rate ever existed for the reason that the same publicity attached to the cancellation, revocation and withdrawal of such tariff rates as attached to the creation thereof.

III.

This defendant has been advised that the complainant purchased certain interests in the "Tubbs Branch," as to the extent of said purchase or the title which the said complainant acquired to said "Tubbs Branch" this defendant is not advised, and therefore leaves complainant to its proofs; in this connection, however, the defendant asserts that the complainant at no time negotiated with it for the purchase of any interest or interests which this defendant had, in and to said branch, or the steel rails or other property belonging to this defendant as a part of said branch, and that defendant has never acquired any interest in and along said "Tubbs Branch" which this defendant is the owner of, or has at any time heretofore been the owner.

Defendant has no knowledge of the amount of timber owned by complainant adjacent to said "Tubbs Branch," accessible over said "Tubbs Branch," other than what certain of its officers had been told regarding the same, therefore as to this part of the third paragraph of the complainant's bill, defendant leaves complainant to its proofs.

This defendant admits that the Churchill Lumber Company had completed its operations upon said "Tubbs Branch," and was about to have the track constituting such "Tubbs Branch" removed; as to the injury which would accrue to the complainant by the re-
46 moval of said branch, this defendant has no knowledge and therefore leaves complainant to its proofs.

IV.

The defendant is not informed regarding the allegations constituting the fourth paragraph of the bill of complaint, therefore it neither admits nor denies the same; leaving complainant to its proofs.

The above traverse of paragraph four is subject to this modification, whatever timber or logs may have been placed at the landings, therein referred to, for shipment, were so placed after the schedule or tariff of rates for shipment had been withdrawn, and without reference to any agreement, contract or understanding in writing or otherwise, express or implied, wherein the said defendant is in any wise a party.

V.

This defendant admits that on or about the 9th day of August, 1910, the Churchill Lumber Company served a notice on certain of the officers of this defendant to the effect that it withdrew a demand before then made for the removal of the rails on such "Tubbs Branch."

Nothing contained in such communication of the 9th of August assured the defendant that the Churchill Lumber Company had other logs or forest products to take out over such "Tubbs Branch," neither was there anything contained in such communication which in any wise asserted that the situation had been changed between that time and the time before then, when the Churchill Lumber Company had ordered the defendant to remove said track, i. e., so far as the relations of the parties to this suit are concerned.

As to all other matters contained in the fifth paragraph of the bill of complaint this defendant denies the same.

47 VI.

This defendant denies each and every allegation, statement and sentiment expressed in the sixth paragraph of the bill of complaint excepting so far as the same is otherwise hereinafter answered or traversed.

So far as the written communication from the Churchill Lumber Company and the complainant in this suit go, this defendant was advised of the complainant's purchase in connection with such "Tubbs Branch," other than that defendant had no knowledge thereof, and further than that defendant was unadvised as to the extent and character of the purchase.

Defendant faithfully adhered to all schedules and tariff rates theretofore and heretofore made in connection with such "Tubbs Branch," and has in no wise disregarded the same as alleged in the sixth paragraph of the bill in this suit.

The defendant has not threatened to remove any rails from said "Tubbs Branch" for the purpose of disconnecting the same from the main line or for any other purpose; defendant has removed certain rails from said branch and asserts that it has a right to remove any and all rails and other property belonging to it whenever it pleases so to do.

That the said complainant has no claim or demand whatever on this defendant respecting such branch, so far as defendant's rails and other property thereon *is* concerned.

This defendant states and alleges that the complainant has never sought to purchase from this defendant any of its property connected with said branch, nor has complainant ever attempted negotiations with defendant respecting the right to use the property of this defendant on such branch, and therefore, defendant alleges that the complainant is without equitable or legal claim against this
48 defendant, and has not in any wise assumed an attitude wherein it is entitled to assert its demands as alleged in its bill of complaint.

VII.

Defendant denies that the complainant is entitled to the relief prayed for or to any part thereof.

VIII.

There is nothing in the bill of complaint whereby the complainant prays for process by way of injunction, therefore, the granting or issuing of an injunction heretofore was unauthorized and inopportune, and without premises or authority, and that any injunction heretofore issued should be dissolved or recalled by the court, and the defendant dismissed with its reasonable costs and charges in this behalf sustained.

IX.

This defendant claims the benefit of a cross-bill by its answer under the premises, the statute and the rules controlling the same, and as a basis for the relief so here claimed and prayed for, this defendant asserts:

(*a.*)

The construction of the "Tubbs Branch" referred to in the bill of complaint was under and by virtue of an agreement by and between the Churchill Lumber Company and this defendant whereby said Churchill Lumber Company was to procure the right of way for this defendant for such branch, grade and tie the same, ready for the placing of rails thereon by this defendant for the purpose of taking out logs and forest products owned by said Churchill Lumber
49 Company at that time. That this defendant was to place on such track rails, and take out over such track such forest products.

(*b.*)

Pursuant to the agreement recited in paragraph "*a*" the said Churchill Lumber Company proceeded to grade and tie a branch road, subsequently known as "Tubbs Branch," but never acquired for this defendant a right of way other than the implied right to enter thereon by reason of the grading and tying of said track.

That no preliminary steps were ever taken as conditions precedent to the establishment of a branch for the use of the public. That

said branch never became a part of the defendant's railroad system whereby it could enforce the perpetual use thereof for the public, and it was recognized by both parties to the original agreement as a track subservient to the mutual use and benefit of the Churchill Lumber Company and this defendant, and to no other person, firm or corporation save by forbearance or mutual indulgence.

(c.)

After said branch was in readiness for use, this defendant proceeded to haul forest products out over such branch belonging to the said Churchill Lumber Company and to other firms or corporations who banked their logs on and along such branch, but never since its construction has the Churchill Lumber Company or any one else procured for this defendant any permanent right of way for such track.

This defendant proceeded to take out forest products for said Churchill Lumber Company until it had hauled all the forest products which said Churchill Lumber Company had at the
50 time said track was placed there in the year 1906 up to June 8th, 1910, when this defendant received from the Churchill Lumber Company a notice in writing, that all of their timber had been removed and that they wanted the track taken from said land. Such notice was in words and language as follows:

"Churchill Lumber Co.

ALPENA, MICH., June 8, 1910.

Mr. C. W. Luce, Gen'l Supt. D. & M. Ry., East Tawas, Mich.

DEAR SIR: Through Mr. W. O. Derry we have just sold to settlers 800 acres of our cut over lands through which the Tubbs Branch runs, and have prospective buyers for all our cut over lands in this and other sections.

The parties to whom we have sold the 800 acres do not want your track on their lands and insist on our having same removed before they will make final payments for same and accept their deeds.

As we are through moving timber on the Tubbs Branch and in view of the above sales, we request that you remove your rails as soon as possible so that we can complete our sales of these lands.

Kindly advise us how soon you can do this and oblige,

Yours very truly,

CHURCHILL LUMBER CO.,
FRED A. KIMBALL,
Pres't and M'g'r."

On receipt of foregoing notice, the general superintendent forwarded the same to the Vice-President of the defendant company with the following notation:

"6/10/'10.

Mr. Hawks:

Will we take up the track as requested? I believe all logs,
51 cedar, etc., that was got out last winter has been loaded out.

C. W. LUCE."

It was then determined by the officers of the defendant company to remove said track at its pleasure, and, needing a portion of the rails on said track for another branch, it proceeded to and did, on the 9th of September, take up and remove from said Tubbs Branch 2,700 feet thereof, as it had a right to do, and as it was ordered to do by the only company, firm or corporation who had ever acquired any interest or right therein.

(*d.*)

This defendant further alleges that by reason of the fact that it was hauling logs for said Churchill Lumber Company and other persons over said track it established a general tariff and schedule of rates for forest products. That after being ordered by the Churchill Lumber Company to remove track, and having no agreement or arrangement with any other persons, firm or corporation for the use of said track, this defendant on, to-wit, the 2nd day of August, 1910, duly revoked, cancelled and annulled such tariff of rates, and did this in the same way and with the same publicity that such tariff was originally created, and in the same way, and pursuant to law that tariff must be cancelled, revoked and annulled if at all, all of which said complainant should have full knowledge of, if it displayed the same diligence to ascertain the revocation of the tariff or rates as it did to learn of its establishment.

(*e.*)

This defendant further alleges that the same Tubbs Branch was established in October, 1906, and its length was 5 miles, 3,552 feet, from the end of the so-called "Sanborn Spur" which had before then been established. That the costs of material and labor
52 for putting in the Tubbs Branch was the sum of $11,200.13. That all of said costs were borne by this defendant, and that this defendant has in no wise been recompensed therefor by the complainant. And that complainant never acquired any right, title or interest in said branch, or any property pertaining to or belonging to this defendant in connection with said branch so as to in any wise dictate the disposition of this defendant's property on the said branch.

(*f.*)

In consideration of the premises this defendant alleges that the complainant is not entitled to the relief prayed for or to any part thereof; that this defendant has taken up no part of the track on such branch since the issuing of the injunction in this cause. That until the disposition of this cause or the dissolution of such injunction this defendant will in no wise interfere with such branch or the track thereon located.

(*g.*)

Defendant alleges that the complainant has inexcusably invoked the aid of this court to the interference with this defendant's disposition of its property, and this defendant has reason to believe that said complainant will continue to interfere with this defendant's dis-

said branch never became a part of the defendant's railroad system whereby it could enforce the perpetual use thereof for the public, and it was recognized by both parties to the original agreement as a track subservient to the mutual use and benefit of the Churchill Lumber Company and this defendant, and to no other person, firm or corporation save by forbearance or mutual indulgence.

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As we are through moving timber on the Tubbs Branch and in view of the above sales, we request that you remove your rails as soon as possible so that we can complete our sales of these lands.

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This defendant further alleges that by reason of the fact that it was hauling logs for said Churchill Lumber Company and other persons over said track it established a general tariff and schedule of rates for forest products. That after being ordered by the Churchill Lumber Company to remove track, and having no agreement or arrangement with any other persons, firm or corporation for the use of said track, this defendant on, to-wit, the 2nd day of August, 1910, duly revoked, cancelled and annulled such tariff of rates, and did this in the same way and with the same publicity that such tariff was originally created, and in the same way, and pursuant to law that tariff must be cancelled, revoked and annulled if at all, all of which said complainant should have full knowledge of, if it displayed the same diligence to ascertain the revocation of the tariff or rates as it did to learn of its establishment.

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This defendant further alleges that the same Tubbs Branch was established in October, 1906, and its length was 5 miles, 3,552 feet, from the end of the so-called "Sanborn Spur" which had before then been established. That the costs of material and labor
52 for putting in the Tubbs Branch was the sum of $11,200.13. That all of said costs were borne by this defendant, and that this defendant has in no wise been recompensed therefor by the complainant. And that complainant never acquired any right, title or interest in said branch, or any property pertaining to or belonging to this defendant in connection with said branch so as to in any wise dictate the disposition of this defendant's property on the said branch.

(*f.*)

In consideration of the premises this defendant alleges that the complainant is not entitled to the relief prayed for or to any part thereof; that this defendant has taken up no part of the track on such branch since the issuing of the injunction in this cause. That until the disposition of this cause or the dissolution of such injunction this defendant will in no wise interfere with such branch or the track thereon located.

(*g.*)

Defendant alleges that the complainant has inexcusably invoked the aid of this court to the interference with this defendant's disposition of its property, and this defendant has reason to believe that said complainant will continue to interfere with this defendant's dis-

position of its property on said branch, and therefore this defendant prays that the complainant, the Fletcher Paper Company, its officers, agents, attorneys and employees, each and all of them be enjoined and restrained from in any wise molesting this defendant in the disposition of its property along such track, and from proceeding in the courts in any wise to molest or interfere with this defendant's disposition of its property along the line of this branch, and that the rights of this defendant and the rights of the complainant respecting such branch and respecting the property on and along
53 such branch be determined in this court and in this cause; that the injunction heretofore issued be dissolved and the bill of complaint filed in this cause be dismissed, and that this defendant recover its cost by it, about its suit, and this behalf expended, and that it have execution therefor.

And this defendant will ever pray.

Dated, October 6th, 1910.

DETROIT & MACKINAC RAILWAY CO.,
Defendant.

By JAMES D. HAWKS,
Vice-Pres't and Gen'l M'g'r.

JAS. McNAMARA,
Solicitor for Defendant.

Business Address, 1233 Majestic Bldg., Detroit, Mich.
(Verified in usual form.)

EXHIBIT B.

STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

At a session of the Michigan Railroad Commission held at
54 its offices in the City of Lansing on the 24th day of March, A. D. 1911.

D–163.

THE FLETCHER PAPER COMPANY, Complainant,
vs.
THE DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Present:

Hon. Cassius L. Glasgow, Chairman; Hon. Lawton T. Hemans, Commissioner.

Appearances:

Frank W. Fletcher, for Complainant; James McNamara, Attorney for Defendant.

Transcript of Testimony.

CHAIRMAN:

This hearing is upon complaint of the Fletcher Paper Company, of Alpena, against the Detroit & Mackinac Railway Company, alleg-

ing that the Railway Company fail to transport logs from its Tubbs Branch, or Martindale Spur, to Alpena, Michigan, in accordance with its published tariff M. R. C. No. 277, or any subsequent issue of said tariff. They set forth in the complaint that the Churchill Lumber Company provided a certain right of way, constructed the grade and placed ties, belonging to them, on the branch, leaving the line of said railway at a point known as Case, Michigan, extending in a southerly direction for a distance of approximately five miles; that the Railway Company laid the steel and maintained such
55 branch, as was their custom. That later, the complainant, Fletcher Paper Company, purchased from the Churchill Lumber Company all its right, title and interest in said branch. That on or about the 9th day of September, 1910, defendant caused to be removed part of the rails over said branch and ceased rendering services over the same. The complainant states that they have a large quantity of timber banked, ready for shipment, on said branch, and also have standing timber tributary to said branch to the amount of 21,000,000 feet or over, which it is necessary to use within a reasonably short time. The complainant states that they purchased this property in good faith, with the understanding that the service by defendant shall be continued as was agreed with the Churchill Lumber Company. It appears the defendant filed a tariff known as M. R. C. No. 277, which applies to the operations over this branch; that the complainant desires to have defendant so place its tracks in condition to render the service which in the judgment of complainant is necessary for the proper transaction of its business, and defendant company refuses to comply therewith.

The Commission are now pleased to hear whatever complainant Fletcher Paper Company may have to state in support of their contention.

FRANK W. FLETCHER, president of complainant company, being duly sworn, makes the following statement:

In the year 1905 the Churchill Lumber Company graded and tied what is known as the Tubbs Branch, a branch extending south from the station of Case, on the Northern and Southern Detroit & Mackinac Railway, going into the timber some five miles. This was graded and tied by the Churchill Lumber Company, at an expense of about $9,000. During their ownership of that roadbed
56 and during the time it was operated for them, there was taken out over it about 20,000,000 feet, all told, of which two-thirds to three-quarters belonged to the Churchill Lumber Company. During the winter of 1909-1910 they had finished up their work and removed all their own timber, and wanted to sell their lands in that locality for farming. They notified the D. & M. Railroad, by writing, to remove their rails from this right of way. The D. & M. Railroad did not remove their rails, and continued to operate the spur. There was left upon that spur some forty to fifty million feet of timber, owned by the Loblell & Churchill Company, of Onaway, and the Fletcher Company; the Fletcher Paper Company owned some 21,000,000 or better. To get this timber out it was necessary

that we have railroad communication, and the road already built was the most convenient method of getting it out. After some negotiations with the Churchill Lumber Company they agreed to transfer their interest in that roadbed to the Fletcher Paper Company for the sum of $4,000, the transfer to run for a length of time such as was necessary to remove all the timber tributary to this right of way. I want to draw a point there; it isn't only until the Fletcher Paper — timber is removed, but all timber tributary to that right of way. The Fletcher Paper Company had been taking out timber over this spur during the years 1908, 1909 and 1910, the three years previous to this, when the roadbed was controlled by the Churchill Lumber Company. The custom is, that lumbermen wishing their timber taken out, have got to furnish the roadbed, grade and ties. Therefore, it became necessary for the Fletcher Paper Company to acquire this roadbed, that the Fletcher Paper Company could use it in taking out timber and for that purpose right was acquired from the Churchill Lumber Company. At the time it was acquired, it was
acquired with the intention of allowing the Lobdell-Churchill
57 Company to continue using it, because in the winter of 1910 I had been instructed by Mr. Lobdell to make this purchase. At that time there were certain restrictions put upon the sale by the Churchill Lumber Company which caused us to drop it. Later in the year those were withdrawn, and we made the purchase. We had taken out in those three years something like 1,300,000 feet of logs over that spur. It had never been our custom, and in all our years of dealing with the D. & M., from its organization, there has never been a written agreement for the removal of timber. Where we had timber we notified the Railway Company, and no written agreement was made; we furnished the roadbed, graded and tied it, and they put down the rail and operated. Where the rails were in existence, where we wished to take out timber, the custom was simply, when you got ready to take out your timber, to notify the railroad. Therefore, I have assumed, this railroad being in existence over the Tubbs Branch, and they having furnished us cars for three years to remove our timber, and they knowing we had a large amount of timber to come out, it was the tacit agreement and understanding, they would do our work. We bought this roadbed on the 3rd of August, I think, 1910. We continued to haul logs over the roadbed until the 6th of September. In that time, between August 3rd, when we acquired it, and the 6th of September, we hauled out something over 100,000 feet. At the time we acquired this roadbed, early in August, the Churchill Lumber Company—up to that time the Railroad Company had made no effort or shown any intention of taking up this rail, at the request of the Churchill Company. When we acquired it the Churchill Lumber Company, in writing, notified the D. & M. that we had acquired title to this roadbed, and withdrawing their request to have the rails taken up. From that time
until the 6th of September they hauled timber for us. On
58 the 9th of September the Railroad Company removed a half mile of rails, starting at a point something like a half a mile from the main line, and taking up the rails for the next half mile, right in front of where our skidded timber lay ready to be shipped,

leaving four miles of track in good condition beyond us in the woods, without any connection with the main line. After formally notifying them to furnish cars for the taking out of this timber, they declined, and from that time to this there has been no timber removed over that spur. We have got today some half million feet of timber to come out, of our last winter's operations, which was left there. The Lobdell & Churchill Company, through their jobber, Mr. Martindale, drew their logs from the end of the Tubbs Branch and hauled them from two to four miles, to the main line, and they have paid this winter, under the agreement that the Lobdell-Churchill Company would pay Mr. Martindale any extra cost of that haul. Knowing the Lobdell-Churchill Company as I do, knowing they have an ironclad contract with the Detroit & Mackinac, I charge the extra haul of that timber from the end of the Tubbs Branch, four miles, to the main line, is today paid by the Detroit & Mackinac Railroad.

CHAIRMAN: You mean, Mr. Fletcher, by that, the expense of transporting that timber from there to the main line, instead of sending it over the Tubbs Branch?

A. I do. The Railroad Company had issued a tariff covering the transportation of forest products over the Tubbs Branch; this tariff had never been canceled. They took their station list and eliminated the Tubbs Branch from the station list, and attempted to show, in the case in the Alpena Circuit, that a change of stations was just as good as a change of tariff. I have brought with me Mr. Le Roy, who is thoroughly conversant with our timber; also Mr. Martindale, who has been jobber for the Lobdell-Churchill
59 Company, who have timber left in the woods, and who was caused to haul this four miles for the Lobdell-Churchill Company, and Mr. Cogswell, who will put the tariffs on record. I will state, that when this branch was taken up, I had no notification of it until a letter written by Mr. Hawks, dated the 12th of September—the rails was taken up on the 9th.

W. H. LE ROY, a witness for complainant, being duly sworn, testifies as follows:

Direct examination.

By Mr. FLETCHER:

Q. You state, Mr. Le Roy, what timber there is, and whether it could come out any other way.

A. The estimates on the timber tributary to that branch at the present time is 21,250,000, twenty-one and a quarter million. The most feasible way in which to get out this timber—that is, our timber only; I understand the Lobdell-Churchill Company have as much hardwood, or more, besides quite a large number of cedar to come out, and presumably could come out at the same time. From the nature of conditions and the lay of the land, the timber remaining in there, or at least four-fifths of it, lies in a direction in which the land falls towards the Tubbs Branch, and for that reason it would be the most feasible route from which to get this same timber. We

have at the present time in the neighborhood of between five and six million feet of fire killed timber, which it is necessary to take out soon, should be taken out this year in order to save it. Most of it has been dead for two years, owing to the serious forest fires in that neighborhood in the fall of 1908, and we have at the present
60 time in the neighborhood, and skidded at the track, ready to haul over this branch, 145,000 feet of logs; 375,000 feet of hemlock logs are skidded in the woods, and from which skidways log roads are already made and built, to a point about four miles from the main line, and on the Tubbs Branch. These logs would have been hauled before this and shipped out, provided the track had been laid and cars placed, so that they could have taken care of them. As it was, being that the track was not laid, that 375,000 feet of logs lie on the skidways in the woods, and are subject to danger from forest fires in the summer. It is the only feasible way to take them out, without hauling the entire length of this track, a distance of about five miles from where the logs were skidded, to what is known as Burgess Spur, which is directly opposite to the switch and of the track known as the Tubbs Branch. The Fletcher Paper Company up to date have handled over the Tubbs Branch, between the years 1907 and up to September 6, 1910, a little over 1,300,000 feet of logs, and as stated by Mr. Fletcher, the part of the track that is torn up was torn up beginning at a point about a mile from the junction with the main line, running toward the main line for a distance of about half a mile. They began to tear it up just beyond where the first of our decked logs at the track were, and they ended about twenty rods toward the main line from the last skidway of logs. Those logs were there and ready to ship at the time the track was torn up. I, in handling the wood operation of the Fletcher Company, did not have any notice in any way that the track was going to be torn up. The first notice I had was when Mr. Martindale telephoned to me that the track had been torn up, about the next day after the track was torn up. The track was torn up on the 9th day of September, 1910, and I think I had notice from Mr. Martindale on the 11th. I had been up on the Tubbs Branch and examined these logs that were landed at the track
61 on the 7th day of September, and at that time the track was intact, and they were still operating trains over it.

Mr. HEMANS: Are any trains now operated over the track that still remains, from the connection with the main line?

A. I understand not. I understand the Railway Company have given notice that no cars would be allowed to be placed at any time on this Tubbs Branch, not even to be switched in there for the purpose of getting them out of the way, or meeting trains.

Mr. HEMANS: There's about a half mile of that track still?

A. Half mile of that track still from the main line in; then there is a break of about a half mile, and beyond that there is about four miles of track still in.

Mr. HEMANS: Had they transacted business on the track right up to the time it was torn up?

A. They did. They hauled logs out of there either the day before, or the forenoon of the day on which the track was torn up.

Mr. HEMANS: And you still had a large amount on the skidways?

A. Landed at the track, ready to load on the cars. These logs remain there today.

Mr. HEMANS: Do you know who is the owner of the right of way where this branch is located?

A. The Fletcher Paper Company is the present lessee of the right of way; they hold it by lease from the Churchill Lumber Company.

Mr. HEMANS: That's all.

CHAIRMAN: I think possibly Mr. Fletcher can answer some questions I have to ask.

Mr. FLETCHER: I would like to put in, that Mr. Le Roy has charge of land matters for the Fletcher Paper Company.

CHAIRMAN: In that position, as having charge of land matters, for the Fletcher Paper Company, are you conversant with the conditions under which the tracks are constructed where the
62 right of way is furnished by the shipper, and the ties and grading, and the steel laid and the track maintained by the Railway Company?

A. I am familiar with the method in which it has always been done before.

CHAIRMAN: Is there any condition in the contract whereby the owner of the right of way can require the Railroad Company to remove their steel whenever they see fit?

A. I didn't know that such a condition existed, and I do know that no such condition exists in so far as the Fletcher Paper Company has been concerned, and George M. Fletcher, who owned the paper company before the Fletcher Paper Company came into existence. I don't know of anything but a verbal contract.

CHAIRMAN: Was you ever a party to these verbal contracts?

A. I have surveyed and laid out a number of tracks for other parties.

CHAIRMAN: You have no knowledge of the character of contract between the Lobdell-Churchill Company and the Detroit & Mackinac?

A. I have not, in any way.

CHAIRMAN: Is there any clause in the contract whereby the Railway Company reserves the right to discontinue service at their option?

A. I never knew of any.

CHAIRMAN: To your knowledge, has the Detroit & Mackinac ever done any passenger business over this line, Tubbs Branch?

A. Not to my knowledge.

CHAIRMAN: Have you any idea as to how the Lobdell Company, who own timber beyond that of the Fletcher Paper Company, how they expect to get out the balance of their timber?

A. Why, I had a conversation with Mr. Lobdell not over a week ago.

(Mr. Fletcher produces a map.) That red is the lands which the Lobdell-Churchill Company owns; the Lodbell-Churchill Company owns the hardwood.

Mr. HEMANS: May I ask what the green lands are?

Mr. FLETCHER: The green lands were Churchill Lumber
63 Company lands, for which they put in this track originally, after which they contracted us the right of way. They are now off of that line. I would like to state, we have dealt with the Detroit & Mackinac Railroad and its predecessors since the road was built to Alpena, in '84-'85. We have never had a contract with them and we have hauled logs as the Fletcher Paper Company and George M. Fletcher, each year that road has been in existence, under verbal contract. That is the custom and habit of every lumber firm in Alpena.

Mr. HEMANS: Do you know of any written contract in reference to this line between the Detroit & Mackinac and the Lobdell-Churchill Company?

Mr. FLETCHER: The Churchill Lumber Company, of Alpena, had this branch put in. The Lobdell-Churchill Company is another firm, of Onaway. I don't think any Alpena concern, don't remember them ever having a written contract with the railroad for hauling timber, except one contract, I think, was drawn up with the Richardson Lumber Company, with reference to timber which afterward went to Bay City.

CHAIRMAN: May I ask again, Mr. Le Roy, if you have any idea how the Lobdell-Churchill Company expect to remove their timber?

A. In conversation with Mr. Lobdell about a week ago, he said to me that if the Tubbs Branch was not relaid, they proposed to extend their own logging railroad into this timber to take out their timber.

CHAIRMAN: They have a road of their own extending from Onaway towards this timber?

A. A short distance, yes. I don't think this would be a feasible proposition for the purpose of getting at the timber, on account of the lay of the land; the ridges they have to cross, and a great deal of the timber would have to be hauled up-hill, unless they lay short branches off the main branch.

CHAIRMAN: Well, then, they have an opportunity, by ex-
64 tending their own line, to get the timber out, without relying on this branch?

A. I understand they have.

CHAIRMAN: Have the Churchill Lumber Company any timber to remove which would necessitate the use of this branch?

A. No.

Mr. HEMANS: Mr. Fletcher, did the notification you received on the 12th of September give you any reason for the——?

Mr. FLETCHER: I would like to read that letter, and have it marked as an Exhibit.

Exhibit 1 introduced in evidence by complainants.

Mr. LE ROY: I would like to say further; it might be intimated that if the Lobdell-Churchill concern can get their logs out over their own rail, why can't the Fletcher Paper Company get their logs out over this Lobdell Churchill road? I would say in regard to that, that the Lobdell-Churchill concern charge a switching rate over their road of $5.00 per car, for the transportation of logs or forest

products over their part of the road, which would mean in the neighborhood of $1.66 a thousand feet, which would be prohibitive, on account of another freight rate from Onaway Point to Alpena.

CHAIRMAN: Are there any other parties, Mr. Le Roy, to your knowledge, that have timber along this branch?

A. Gardner and Peterman own the elm, or a portion at least, of elm and basswood on these same lands, acquired by purchase from Mary Chandler, from whom the other parties purchased their timber. All that land belongs to Mary Chandler, but the different parties have purchased the timber on it.

CHAIRMAN: Do you know whether they had any arrangement made with the Detroit & Mackinac for the hauling of their timber?

A. I do not.

65 CHAIRMAN: Could you give any particular reason why the Detroit & Mackinac should remove the portion of the track directly in front of the Fletcher Paper Company's bank of logs?

A. I could make a rough guess what it was; I have my suspicions as to the reason for it.

CHAIRMAN: You know what I mean. Any reason suggest itself to you as to any physical conditions of the road that would make it necessary to remove the rails there rather than nearer the main line?

A. I have not. The physical conditions of the road would not necessitate the tearing up of that track.

CHAIRMAN: Know of any conditions existing there that wouldn't accomplish that purpose by removing the rails from the main line out on the Tubbs Branch as well? Couldn't the purpose be accomplished by stopping traffic over that line from the switch of the main line back half a mile, as well as in front of the Fletcher Paper Company's logs?

A. Most assuredly.

CHAIRMAN: Do we understand you correctly, to say the rails removed were within the limit to logs banked by the Fletcher Paper Company?

A. Of the logs banked by the Fletcher Paper Company, at that time, on the Tubbs Branch.

CHAIRMAN: Mr. Fletcher, when you assumed ownership or assignment of the lease of the Churchill Lumber Company to the right of way occupied by the Detroit & Mackinac Railroad across their property, was there any understanding between you and the D. & M. at that time as to the continuance of the operation of that branch?

Mr. FLETCHER: No, sir, there was not. I assumed that, after an operating experience of ten years, there would be no change, and it was up to me to acquire and control the right of way, and stop Mr. Churchill from ordering it up. For that purpose I have acquired title to it, and assume that is the case with every logging road in

66 operation in Michigan. The title is to some individual who has timber to get out, and there was no more use of my dealing with the Railroad Company, because it had been dealt with as is the custom.

CHAIRMAN: Did you see any contract made between the Churchill Lumber Company and the D. & M.?

Mr. FLETCHER: I have seen that contract recently.

CHAIRMAN: Do you recall any provision of that contract which especially gives the Churchill Lumber Company the right to order the D. & M. to remove their rails?

Mr. FLETCHER: No, sir. I understand they ordered it out simply under the common law; the property was theirs, and if they saw fit to order the rails up, they had a right to do it. The Churchill Lumber Company had hauled their lumber out, for which the railroad was built, were through with their work, and wanted to sell the land and get something back on the $9,000 it cost them. Therefore, we bought their rights, with the understanding that the road was to be left there.

CHAIRMAN: The timber which you now have up there and desire to bring out over that line, was this bought from the Churchill Company?

Mr. FLETCHER: No, sir. It was bought the same as the Lobdell-Churchill timber, which was bought from Mary Chandler. It was bought, and had been bought ten years, had been owned by us, and the fact we did own it, and wanted to bring it out was known to the Railroad Company, because I had talked with their general manager.

CHAIRMAN: Did the Railway Company ever give you any other reason, orally or in writing, why they took the track up, except what is embodied in that letter?

Mr. FLETCHER: They did not. The general manager was shy about telling me anything; said he would refer the matter to Mr. Hawks. At that time I notified the general manager I had logs to bring out, and wanted cars to be placed.

67 Complainant's Exhibit 2 introduced in evidence.

Mr. MCNAMARA: I presumed Mr. Glasgow referred to an agreement between the railroad and the Churchill Lumber Company, that is the agreement I presume you refer to, so Mr. Fletcher hasn't any copy of any agreement between the Churchill Lumber Company and the Detroit & Mackinac Railroad.

Mr. FLETCHER: I said I had a copy of a contract with the Lobdell-Churchill Company.

Mr. HEMANS: But you did have a written conveyance when you bought the line?

Mr. FLETCHER: I have a written conveyance of when I bought this right of way.

CHAIRMAN: Does the transportation of your logs over the Tubbs Branch require any different service than the Churchill Lumber Company required, under the original contract?

Mr. FLETCHER: It does not. The transportation of our logs, the Churchill logs, and all logs by the Detroit & Mackinac Railroad is one system, using the same cars, same motive power, same men, the same in every way, except the matter of charges, which is very different.

CHAIRMAN: I ask that question, it is suggested by Mr. Hawks' letter, "that pending some question as to how the branch is to be used——"

Mr. FLETCHER: I see no reason why we should not be treated the same as anybody else. He has a dozen different branches, dealing with a dozen different people.

CHAIRMAN: Here's another question. "If the branch is to remain, do you expect to deed the right of way to this company together with the right?" Is it the custom, so far as you know, for the party to deed the right of way to the railroad company?

Mr. FLETCHER: It is not the custom. In fact, I don't be-
68 lieve they can point to one instance where it has been done.

Mr. HEMANS: How about the other phase of the question, as to whether others were to have the right to use it?

Mr. FLETCHER: The question was never brought up. We have never prohibited the railroad from using it. The only other people having use for it are the Lobdell-Churchill Company, and I had assumed up to that time they were going in as owners with us to this right of way.

CHAIRMAN: Well, where tracks are laid, under the conditions as evidently it was laid for the Churchill Lumber Company, is the rate to be paid for the transportation of the logs one of the conditions as to the construction of the branch?

Mr. FLETCHER: It is not. They publish a tariff which applies to everybody taking logs over that track. Mr. Churchill put $9,000 into it. Emery Martin, ourselves and the Lobdell Company hadn't put a cent into it, and yet the railroad company, as long as they were maintaining their rails, were bound to haul for everybody under the same price. The question — as to whether the man who paid for the right of way had some redress in the matter, and it hasn't been brought up before, but we considered he should have something returned for it.

CHAIRMAN: What do you assume Mr. Hawks means when he uses this language: "If it is your intention to operate the Tubbs Branch yourself, I would be pleased to rent you the rails"?

Mr. FLETCHER: I explain that with the one word "bluff." Mr. Hawks knew I had no facilities, no method of operating the tracks ourselves; that it would mean buying cars, buying locomotives, hiring the rail put in, and a lot of other foolishness. I see no reason
why, if he was there to do business, and they claim 70% of
69 their business is logging business, why we should be picked out and put under any other conditions than other people.

CHAIRMAN: Is it your practice, so far as experience has shown, that they have rented rails to shippers up there, for the purpose of operating the road themselves?

Mr. FLETCHER: They never have, absolutely. Our method is the same as others, and there had been no oral or written communication in any way applying to any different methods of doing business. I will say that after these rails were torn up, and after I got the letter from Mr. Hawks, on the 24th of September I wrote Mr. Luce, general superintendent, making formal request that cars be

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placed. (Reads Exhibit 2, consisting of four letters.) We claim their tariff G. F. D. 669 has never been canceled.

Complainant's Exhibit 3 introduced in evidence, and read.

CHAIRMAN: With whom do you enter into contract when you want to build some branch?

Mr. FLETCHER: Mr. Luce, the general superintendent.

CHAIRMAN: Is he some official?

Mr. FLETCHER: He has full authority; he was the person we dealt with.

CHAIRMAN: Has he ever refused to conclude a contract before, without referring it to Mr. Hawks; has he ever refused to close up the contract and leave it to Mr. Hawks?

Mr. FLETCHER: No, he has not.

CHAIRMAN: You wouldn't have knowledge of how he treated either applicants?

Mr. FLETCHER: I would not.

Mr. LE ROY: There is one matter that I would like to make clear to the commission, and that is, there may be more or less misunderstanding as to firm names. The Churchill Lumber Company,
70 of the city of Alpena, are the parties who built, graded and tied this road. The other parties, known as the Lobdell-Churchill Company, are an Onaway concern, and have no connection whatever with the Churchill Lumber Company, of Alpena. There is more or less similarity of names, which seems to be more or less confusing.

CHAIRMAN: Mr. Fletcher, when you assumed control over the right of way occupied by the Tubbs Branch from the Churchill Lumber Company, was any portion of the conversation or agreement directed towards the conditions under which the Detroit & Mackinac would continue service?

Mr. FLETCHER: The Detroit & Mackinac were not taken into the transfer discussion at all. I assumed it made no more difference to the Detroit & Mackinac, and I asked Mr. Churchill, when I made that purchase, to notify the railroad company that his request that the rails be taken up be withdrawn, and that was the only reference to the Detroit & Mackinac in the transfer, and I gave no notice to the Detroit & Mackinac myself that we had made this purchase.

CHAIRMAN: Did the request of the Churchill Lumber Company to have the rails removed, was that made after you had begun moving out your logs over that branch?

Mr. FLETCHER: Oh, yes, sir, because we had been moving our logs three years, 1908, 1909 and 1910. The Churchill Lumber Company didn't complete their lumbering until 1910. Then, failing to make a deal with Lobdell and ourselves in this transfer in the winter of 1910, they asked to have the rails removed.

Mr. HEMANS: Is that the polite way of asking to pay $4,000?

Mr. FLETCHER: I consider they had a right to; they had spent $9,000; I don't consider we had a right—we had as much timber in there as they had originally, and it was up to us to make
71 some compensation. The trouble with the first negotiations was, Mr. Kimball wanted certain amount of restrictions that we couldn't give, and that was afterwards eliminated.

CHAIRMAN: What disposition was to be made of this land occupied by the railroad?

Mr. FLETCHER: Mr. Kimball notified the railroad he had sold part of this land, and settlers were going in there.

CHAIRMAN: Have you seen any indications of this being fulfilled?

Mr. FLETCHER: No, I have not. I think that was another case of bluff.

Now, I would like to put in Mr. Martindale, to show the use of that spur since 1905. I assume, Mr. Glasgow, you want all this testimony as facts put in. I would like to state here, as explanatory, that we brought this case in the Alpena circuit, asking for mandatory injunction to have this track put down and the business go on. Mr. McNamara, with his finesse, put that off and put that off until finally, I think, that injunction was issued. The railroad company did not obey the order of the injunction, and we cited them with contempt. The contempt proceedings were put off, the contempt side was dropped, and the tale was heard on its merits or demerits, and Mr. McNamara drew first blood on me by having the case go against me. I have brought down here Judge Emerich's opinion; also our brief in the case, which I wish to submit, and I also wish to submit a case that has just been rendered by the United States supreme court in the matter. I will submit those likely.

72 G. E. MARTINDALE, a witness for complainant, being duly sworn, testifies as follows:

Mr. FLETCHER: Will you tell the commission who owned the track operated there, who operated it, and to your knowledge, what timber has been taken out of there during that time, and any knowledge you have of the conditions there.

A. Well, in the spring of 1905, I took a logging contract with the Churchill Lumber Company, of Alpena, to remove about 14,000,000 — of timber in those different sections and towns, and they built about, I think, two miles and a half, between two and a half and three miles, of this road, and then I built the balance. What we call the main line has two branches off of it. During the summer of 1905, and during the summer afterwards and the winter, I shipped out of there about 14,000,000 feet of logs, cedar, about 4,700 cars. I operated for them there continuously there from the spring of 1905 until I finished up. I finished with the Churchill Lumber Company a year ago this spring, now.

CHAIRMAN: This memorandum you are refreshing your memory with, was taken from your books?

A. Yes, sir. Since then I have operated in there on the same branch for the Lobdell-Churchill Company, of Onaway, and the Fletcher Paper Company, of Alpena. Now—and the Emery-Martin Lumber Company, of Cheboygan. During the winter of 1908-09 and 1909-10, we shipped about 350 cars; the Lobdell-Churchill Company, of Onaway.

CHAIRMAN: All over the Tubbs Branch?

A. Yes, sir. During the winter of 1909-10 and 1910-11 we shipped about 1,000 cars. I shipped these myself.

Mr. FLETCHER: I would like to ask how they shipped over that spur in 1911, because that spur was taken up in 1910? You mean the logs you drew around it?

A. Yes, sir. Now, Mr. Robinson and Mr. Johnroe were
73 operating for the Lobdell concern on the same branch in the winter of 1909, and the two of them shipped about 600 cars, and for the Fletcher Paper Company, 1908-09, I shipped about 100 cars. For other parties I shipped about 300 cars.

Mr. FLETCHER: Making in all about how many?

A. About 7,250 cars.

CHAIRMAN: Between what times?

A. The balance was finished in September. From 1905 up to last fall, the time it was taken out, on the 9th of September.

CHAIRMAN: Am I correct in remembering that you were interested in any of the logs shipped by the Fletcher Paper Company?

A. Yes, sir, I took them up for them: that's a year ago this last winter, and the summer—well, the winter of 1907-08—no—1908-09 and 1909-10, this year, something like about 525,000, I think, on that branch.

CHAIRMAN: From your knowledge of the character of timber they have transported, and the conditions under which it is loaded, would you be led to believe it would require any different service—that that branch would have to be operated under any different conditions than the service rendered other parties shipping logs over the same branch?

A. No, sir.

CHAIRMAN: Do you know of anything that would lead you to believe the service would be more expensive in handling the Fletcher Company's logs than other parties', situated on the same line?

A. No, sir.

Mr. FLETCHER: Mr. Martindale, were you paid a certain sum under your contract with the Fletcher Paper Company and the Lobdell-Churchill Company for delivering timber on cars on the Tubbs Branch?

A. Yes, sir.

Mr. FLETCHER: When it became necessary, after taking up that track, to take the lumber over the main line, it was done under what arrangement? Were you paid for the extra haul?

74 A. Yes, sir, the company paid me for cost. The timber was skidded, ready to land and load on the cars, and I removed it to Pritcher Spur.

Mr. FLETCHER: How long a haul is that extra?

A. About four miles.

Mr. FLETCHER: You did that on sleighs?

A. Yes, sir.

Mr. MCNAMARA: Who do you mean by company, who paid you?

A. The Lobdell and Churchill representative.

Mr. FLETCHER: In rough figures, about how much do you think extra cost per thousand that would be?

A. It would be between $2.50 and $3.00 a thousand.

Mr. FLETCHER: Your contract with the Lobdell-Churchill Company was how much for putting it on the cars?

A. Five dollars.

Mr. FLETCHER: $2.50 extra would be $7.50, and $1.50 freight; that would be $9.00 their logs would cost them?

Mr. MCNAMARA: You are not complaining on their account, are you?

Mr. FLETCHER: No, I was just trying to show how they were being so kind to make no fuss on this extra haul.

CHAIRMAN: In order to haul these logs in compliance with your contract with the Lobdell-Churchill Company, after these rails were removed, you had to draw these logs about four miles?

A. Yes, sir.

CHAIRMAN: How far beyond the main line of the D. & M. did you go on the other branch in order to ship them?

A. I hauled them across the main line to a spur called Pritcher Spur.

CHAIRMAN: How far is the point on Pritcher Spur beyond the main line, the distance you traveled directly?

A. About 20 rods.

CHAIRMAN: So that in fact, it would be like drawing to a siding of the D. & M.?

A. Yes, sir.

Mr. FLETCHER: I will state—Martindale Spur leaves the main line on the South, and Pritcher Spur is directly opposite, at the same point?

A. Yes, sir.

75 CHAIRMAN: You have no knowledge of any arrangement that might have been made between the Detroit & Mackinac Railroad and the Lobdell-Churchill Company to cover this additional expense?

A. No, sir.

CHAIRMAN: About how many thousand feet did you draw from there for them after the rails were removed from the Tubbs Branch?

A. Somewhere between 2,200,000—2,300,000. I haven't got the scale of it—about 600 cars or better.

CHAIRMAN: Where was that to be shipped—to Onaway?

A. Yes, sir.

CHAIRMAN: What is the difference in the distances from where the Tubbs Branch joins the main line of the D. & M. to Onaway, and to Alpena?

A. Well, it is about five miles.

CHAIRMAN: What is the difference from where the Tubbs Branch joins the main line to Onaway?

A. It is five miles.

CHAIRMAN: What is the distance from where this branch strikes the main line to Alpena?

A. About 40 miles, I think.

CHAIRMAN: That's all I wanted to bring out—the transportation of the Fletcher Paper Company's logs would be of greater importance to the Detroit & Mackinac than the Lobdell-Churchill logs—longer haul.

Cross-examination.

By Mr. McNAMARA:

Q. Were you in the employ of the Churchill Lumber Company when this spur was built?

A. Through logging contract, yes, sir.

Q. The spur was built for the Churchill Lumber Company to get out its logs?

A. Yes, sir.

Q. And you say that you finished lumbering for them a
76 year or longer ago?

A. A year ago last spring, in the winter.

Q. And they had nothing in on this branch to bring out at all, had they?

A. No, sir. There was some little lumbering going over that branch at that time.

Q. Anything in there?

A. I think during the summer they had a little cedar in there shipped out at different times, but everything was out to the track.

Q. Everyone who has done lumbering up there the last two years has been obliged to make terms with the Churchill Lumber Company, in order to bring their stuff out?

A. I don't know as to that.

Q. Don't you know the Churchill Lumber Company has charged everybody who brought out logs there, 50c. a thousand?

A. Yes, I understand they charged $1.50 a car.

Q. Everybody who wanted to bring out stuff has had to pay them 50c. a thousand?

A. Yes, sir.

Q. And were you present in Alpena when this case was tried before Judge Emerick?

A. No, sir.

Q. That's all.

Mr. FLETCHER: I wish to state, Mr. Chairman, that the Fletcher Paper Company never paid the Churchill Lumber Company a cent for taking timber out. I also want to say that the Lobdell people never paid a cent for the taking out of any timber.

Mr. McNAMARA: They have sent them bills, haven't they?

Mr. FLETCHER: Yes.

Mr. McNAMARA: But you get from Mr. Churchill the rights to collect that bill from the Lobdell Lumber Company?

Mr. FLETCHER: I have the rights to the past, present and future. If there is nothing else, Mr. Cogswell will take up the matter of the tariff.

77 CHAIRMAN: I would like to ask, Mr. Fletcher if at the time of making this arrangement with the Churchill Lumber Company, or any time since, you have had any conversation with any officer of the Detroit & Mackinac as to the rate which should apply on the logs you had to ship out?

Mr. FLETCHER: No, sir.

CHAIRMAN: Was there any controversy between you as to the rates which did apply on the shipments before you bought this?

Mr. FLETCHER: Nothing, except the general controversy which is now in court; we had no individual controversy, and we have been paying for the last three years under that decision; we are paying under protest, pending action of the final court.

CHAIRMAN: Have any statements been made to you, directly or indirectly, by any representative of the D. & M., that if you would pay a certain rate for the hauling of these logs, service would be rendered?

Mr. FLETCHER: They haven't said anything as to the price in this letter.

Mr. MCNAMARA: You never replied to Mr. Hawks' letter, did you?

Mr. FLETCHER: I can't tell you whether I did or not.

Mr. MCNAMARA: You wrote to Mr. McHarg, down to New York, though, complaining of Mr. Hawks?

Mr. FLETCHER: I did.

Mr. MCNAMARA: You never answered that letter of Mr. Hawks', did you?

Mr. FLETCHER: I don't know. If Mr. Hawks couldn't find my answer, that should be evidence itself; it is immaterial. I just as leave say I didn't answer.

Mr. MCNAMARA: I am just asking you for the fact?

Mr. FLETCHER: The fact is, I don't know. If the letter couldn't be found, I will assume it wasn't answered.

78 FRANK COGSWELL, a witness for complainant, being secretary of the Alpena Shippers' Association, being duly sworn, states and testifies, as follows:

Mr. COGSWELL: We wish to introduce D. & M. G. F. D. 669, M. R. C. No. 277, which names the rates on logs from various points to Alpena. This tariff has become effective on January 2, 1910, and is still in effect, according to the files of the commission. It shows the rate of $3.25 per thousand feet on Martindale Spur, from Martindale Spur (Tubbs Branch) to Alpena. This was Exhibit "A" in the case before the Alpena Circuit Court.

Complainant's Exhibit 4 introduced in evidence.

I also wish to introduce another copy of the same tariff, M. R. C. No. 277, which was Exhibit "P" in the case before the Alpena Circuit Court, introduced by the Detroit & Mackinac Railway, which has, in red ink, notations on the back of it—there is a line drawn through Martindale Spur (Tubbs Branch), and the notation written, apparently by some employe of the Detroit & Mackinac, saying "Eliminated by Sup. No. 2 to G. F. D. No. 565-A, a copy of which is attached hereto. Also see copy of G. F. D., No. 565-B, attached hereto."

Mr. MCNAMARA: Who did you say introduced that?

Mr. COGSWELL: I say I think it was——

Mr. MCNAMARA: Why don't you testify as to facts?

Mr. FLETCHER: I will say all these tariffs came out of our office.

Mr. COGSWELL: I withdraw that statement, and say that this tariff was not introduced by the Detroit & Mackinac as Exhibit "P," but that it is Exhibit "P" in this case, and I say further, I don't know who made this notation on the reverse side of it. In connec-
79 tion with the making of that notation, however, I refer to exhibit a letter from Mr. C. W. Luce.

Complainant's Exhibit 5 introduced in evidence.

I refer to Exhibit 3, in which he called attention to the station list, and stating that that eliminates points on the Tubbs Branch from their tariff.

I also introduce G. F. D. 565-A, which is M. R. C. No. 300, Detroit & Mackinac Railway official station list No. 2, which does not name any rates.

Complainant's Exhibit 5 introduced in evidence.

Also supplement No. 2, G. F. D. No. 565-A, to M. R. C. No. 300, which, by correction on page 3, eliminates Martindale Spur and the end of the Tubbs Branch.

Complainant's Exhibit 7 introduced in evidence.

Also Detroit & Mackinac G. F. D. 565-B, M. R. C. No. 321, official station list No. 3, which cancels M. R. C. No. 300, and is a list of the stations on the Detroit & Mackinac Railway, from which the Tubbs Branch and Martindale Spur have been eliminated.

Complainant's Exhibit 8 introduced in evidence.

I also wish to say in connection, that the method by which the log tariffs of the Detroit & Mackinac have been corrected, that it is not only not in accordance with the rules of the commission, but it is not a lawful way to correct tariffs, to take stations out of tariffs and cancel rates.

I also introduce Detroit & Mackinac G. F. D. 564, M. R. C. 210, naming rates on logs and lumber from the Martindale Spur
80 and Tubbs Branch to Onaway, to which no correction has been made eliminating the Tubbs Branch and Martindale Spur.

Complainant's Exhibit 9 introduced in evidence.

Also a letter from Mr. J. K. Hudson, general freight agent of the Detroit & Mackinac Railway, to the Fletcher Paper Company, Alpena, dated November 1, 1910, enclosing a copy of their G. F. D. 670, M. R. C. No. 278, which names rates on hemlock bark, bolts and pulp wood to Alpena and Cheboygan, from the Martindale Spur (Tubbs Branch), and would call particular attention to the fact that this letter was written on the first of November, 1910, while the Tubbs Branch was discontinued, and part of the track taken up on September 9, 1910.

Complainant's Exhibit 19 introduced in evidence.

These exhibits are introduced and evidence given, with a view of showing that while the Detroit & Mackinac refuse to handle logs over that Branch, they have published tariffs in force, which advertises that they will handle logs from that branch at certain rates.

Mr. HEMANS: Did you intend to leave this plat?

Mr. FLETCHER: I intend to leave everything the commission want. There's a plat of that kind filed with our complaint, filed with you, a duplicate of that.

JAMES MCNAMARA, appearing in behalf of defendant, being duly sworn, states and testifies, as follows:

I want to say that I am general attorney for the Detroit & Mackinac Railway Company, and have charge of all of the law
81 suits of that company, rate cases and others. In filing my answer to the complaint made by the Fletcher Paper Company in this case against the Detroit & Mackinac Railway Company, I set up in that answer that I should avail myself of a plea in bar of this action, for the reason that there was a former case pending and a trial involving the same issues, same parties and same merits as are involved in the action in this case. In support of that I want to introduce a certified copy of a bill of complaint.

Defendant's Exhibit 1 introduced in evidence.

Which was filed in the circuit court for Alpena county on the 10th day of September, 1910. It is a bill of complaint on the chancery side of the court, filed by the Fletcher Paper Company, a Michigan corporation, and the same complainant that is in this case, against the Detroit & Mackinac Railway Company, a corporation, which is the same defendant as is in this case; and this bill of complaint is signed by the Fletcher Paper Company, per Frank W. Fletcher, president, the same Fletcher Paper Company that is complainant in this case, and the same Frank W. Fletcher who makes the complaint for the Fletcher Paper Company in this case. This bill of complaint asks for the same relief. I want to say that that is the same branch (Tubbs), as is involved in this case. (Read paragraph 8 of bill of complaint, marked Defendant's Exhibit 1.) I will say that the bill of complaint filed in this cause is practically the same complaint, precisely the same allegations that is filed before the commission in the present case, and asks for precisely the same relief, and that the complainants, so far as the relief asked and so far as the merits of the action are concerned, are identical. I desire to introduce in evidence.

82 Defendant's Exhibit 2 introduced in evidence.

Which is the answer of the Detroit & Mackinac Railway Company, the defendant in the chancery case, in Alpena, to the bill of complaint of the Fletcher Paper Company, the complainant, known as Exhibit 1; and that this answer of the Detroit & Mackinac Railway Company was filed in the Alpena circuit court in chancery on the 11th day of October, 1910. That the allegations contained in this answer set up practically the same defense as set up in the present case here before the commission.

Mr. HEMANS: When was the bill filed?

Mr. MCNAMARA: The bill was filed the 10th day of September, 1910. The answer of the defendant Railway Company, which as I said, sets up practically the same defense as set up here, with the exception of the plea in bar. It is in the nature of a cross bill, asking for affirmative relief against the Fletcher Paper Company. That upon the filing of the bill of complaint in this case in the Alpena circuit court by the Fletcher Paper Company, a subpœna was issued out of and under the seal of the circuit court for the county of Alpena, compelling the appearance of the defendant in this action,

and in that action, to answer the bill of complaint, which I will have marked.

Defendant's Exhibit 3 introduced in evidence.

These are all certified copies. That at the same time and under date of the 10th day of September, upon the filing of the bill of complaint in the Alpena circuit court by the Fletcher Paper Company, an injunction was issued out of and under the seal of the circuit court for the county of Alpena, signed by Honorable Frank Emerick, circuit judge, and attested by the clerk of the court, which sets forth the following injunctive matter by the court:

83 Defendant's Exhibit 4 introduced in evidence, and read.

Defendant's Exhibit 5 introduced in evidence, which is the appearance of the defendant, Detroit & Mackinac Railway Company, after this service of subpœna and injunction, by myself, as its attorney.

Defendant's Exhibit 6 introduced in evidence.

In the answer of the Fletcher Paper Company to the affirmative matters set up in the cross bill of the defendant, the Detroit & Mackinac Railway Company, this answer being filed on November 9, 1910, signed and sworn to by the Fletcher Paper Company, per Frank W. Fletcher, its president. All of these papers of the Fletcher Paper Company being introduced by Frank D. Scott, as solicitor for complainant, representing the Fletcher Paper Company.

Defendant's Exhibit 7 introduced in evidence.

Is the replication filed by Frank D. Scott, as solicitor for the complainant, Fletcher Paper Company, and signed by him as solicitor for that company, and filed on the 9th day of November, 1910.

Defendant's Exhibit 8 introduced in evidence.

Is an order to show cause, entitled in the matter of the Fletcher Paper Company, complainant, vs. Detroit & Mackinac Railway Company, in the circuit court for Alpena county, in chancery, the petition being signed and sworn to by Frank W. Fletcher

84 on the 15th day of October, 1910, in which Mr. Fletcher sets forth the fact that since the issuing of the injunction on the 10th day of September, that the Detroit & Mackinac Railway Company, the defendant has failed to put in the rails and operate the Tubbs Branch, and that they have failed to comply with the injunction issued by the court in that respect, and that he understands they refuse to do so, and he asks that they be cited for contempt of court. Citation is issued by Judge Emerick, and is dated on the same day.

Defendant's Exhibit 9 introduced in evidence.

Is the answer to the order to show cause in that same case, and is signed by J. D. Hawks, vice-president and general manager of the Detroit & Mackinac Railway Company, and is sworn to on the 4th day of November, 1910, and was filed in the case on the 5th day of November, 1910.

Defendant's Exhibit 10 introduced in evidence.

Is a certified copy of the calendar entries in the case of the Fletcher Paper Company vs. Detroit & Mackinac Railway Company, being the case in which the other exhibits have been introduced, pending

in the circuit court for the county of Alpena, showing the order of the starting of the case and the issuing of the papers thereon. After the order to show cause was issued in that case, Judge Emerick refused to punish the defendant, the Detroit & Mackinac Railway Company, for any contempt in this case, and he said that he would hear the whole case together on its merits, and set the case for hearing at Alpena on the 22nd day of November, 1910. On that day I was present in court, in Alpena, representing the defendant, Detroit &
Mackinac Railway Company, Mr. Frank D. Scott was present
85 with Mr. Fletcher, representing the Fletcher Paper Company in that case, and the case was started Tuesday, November 22, in the Alpena circuit, before Judge Emerick. Mr. Fletcher was there and testified to substantially the same things he testified to here today. The whole controversy was over the Tubbs Branch, and to order our company to run over it, under the facts as presented by Mr. Fletcher, and these same tariffs were introduced as were introduced here now. They were called Exhibits A, B, C in that case, up as far as, I think, some thirty, forty exhibits introduced in the case. The testimony of Mr. Fletcher, as I say, was practically the same testimony as given here today with reference to the Tubbs Branch. Mr. Le Roy, who was here today, testified to the same things in this case, saying he was looking after the lands of Mr. Fletcher. He said at that time there was 20,000,000 to 25,000,000 up there on the Tubbs Branch, they wanted to get at, and other things we heard which are practically the same things that are testified to here today. Mr. Frank W. Gilchrist was a witness for Mr. Fletcher. Mr. Richardson, of the Richardson Lumber Company, was a witness at this same hearing before Judge Emerick, and Mr. Fred Kimball, president of the Churchill Lumber Company, for which this branch was built, was also a witness on behalf of the complainant, and there was also a letter—I can't produce the letter—which Mr. Kimball wrote. I can't produce it because it is an exhibit up there in this case, and I can't get it.

CHAIRMAN: Could you get a certified copy of it?

Mr. MCNAMARA: I suppose I could, but the substance of it is, they ordered us, by Mr. Kimball, to take up the Tubbs Branch. The Tubbs Branch was a private logging branch, radiating from the main line a distance of some five miles, possibly a little more, into the timber lands then owned by the Churchill Lumber Company.
It was built for the Churchill Lumber Company, at the re-
86 quest of Fred A. Kimball, for the purpose of getting out their stuff, and their stuff was taken out. The right of way belonged to the Churchill Lumber Company. Mr. Kimball wrote a letter to the Detroit & Mackinac Railway Company, ordering them to take up their steel from that right of way, saying, as Mr. Fletcher stated, they had sold that land, or some parts of it, to some settlers, who wanted to use it for agricultural purposes, and who did not want the rails on there, and ordered them off. The railroad company undertook to take them off, upon receipt of his letter, and a bill was filed in the Cheboygan circuit court. This is something Mr. Fletcher

neglected to tell you, that a bill was filed in the Cheboygan circuit court.

Mr. FLETCHER: What steps were undertaken to take up the rail?

Mr. MCNAMARA: The men went up there to take them up, and somebody reported it to Emery-Martin Company; we thought you did, and Emery-Martin filed a bill in the Cheboygan circuit court. The men were gotten to go and take up this track, and date was named to take up that track under my own orders.

Mr. FLETCHER: Was that date made public?

Mr. MCNAMARA: I don't know, but I do know the Emery-Martin got out a bill, and made not only the Detroit & Mackinac a defendant, but also the Churchill Lumber Company, defendants in that case.

Mr. FLETCHER: I will admit that.

Mr. MCNAMARA: I will also say, that Mr. Frank D. Scott, who is your attorney in this case, appeared in that case.

Mr. FLETCHER: Yes, sir.

Mr. MCNAMARA: And we were prevented, by injunction issued by Judge Shepard, from taking up this track at that time, and
87 that is why this Tubbs Branch was not taken up under this first notice, and afterwards by order of Judge Shepard.

Mr. FLETCHER: Has that injunction ever been dissolved?

Mr. MCNAMARA: Yes, sir, it has been dissolved by stipulation.

Mr. FLETCHER: I dispute that, because the attorneys on either side say they would not stipulate that fact.

Mr. MCNAMARA: Then sometime afterwards—I forgot just when the injunction was dissolved in that case, but just shortly before this track was taken up, and we undertook taking up these rails again, and we started taking them up. Mr. Fletcher files this bill I have just read to you, in the circuit court, preventing us from taking it up.

Mr. FLETCHER: Where did you start to take that up?

Mr. MCNAMARA: It don't make any difference where we started taking it up; if you hadn't prevented us taking it up we would have had it all up today. And Mr. Fletcher complains that we only took up a half a mile of it. We would have taken it all up if we had been let. We were engaged in taking it up when the officer came out and served injunction on us, and as I say that led to the suit, which is precisely the same action as he has before the railroad commission today. We went up and tried that case before Judge Emerick on the 22nd day of November, under the same facts presented before you today, and spent a day or two, a day and a half anyway, and that case was still in the hands of Judge Emerick, waiting for decision, when Mr. Fletcher came down here and presented this case before you. The opinion of Judge Frank Emerick, of the Alpena circuit court, in chancery, in the case of the Fletcher Paper Company vs. the Detroit & Mackinac Railway Company, involving precisely the same issues, by the same parties, as in the matter here in this hearing before the commission today.

88 Defendant's Exhibit 11 introduced in evidence, and read.

I will say that during the taking of testimony up there it developed, from the testimony of Mr. Kimball himself, that he was

making a charge of 50c. a thousand, and had made such charge to the Lodbell-Churchill Company and the Emery-Martin Company, for taking its logs off the branch, on the theory that he was owner of this right of way, and had the right to do it. He testified he had a bill for some sixteen hundred and some dollars against the Lubdell-Churchill Company, which he had presented for payment but the Lobdell-Churchill Company had not paid it. Exhibit 2 was introduced in evidence, as a copy of the letter from the Churchill Lumber Company to Mr. Fletcher, which was dated the first day of October, 1910, and addressed to the Fletcher Paper Company, Alpena, Michigan. (Reads letter.) The letter that Mr. Hawks wrote Mr. Fletcher, when he heard Mr. Fletcher had purchased these rights, and asked him whether he was going to charge other people for the taking out of timber and hold up everybody along that line, and make them pay to haul stuff out on the equipment of the Detroit & Mackinac Railway. Mr. Fletcher never replied to that letter. Mr. Kimball was doing that same kind of business, and Mr. Fletcher has now succeeded to his rights to some sixteen hundred fifty dollars against the Lodbell-Churchill Company, which he holds against them today. Mr. Fletcher never called on the Detroit & Mackinac officials—never notified them he was about to buy these rights, and wanted the tracks continued there, and hasn't yet. The first official notice we got of it is a suit in court. Mr. Fletcher never called to notify Mr. Hawks about this thing. Mr. Hawks writes him this letter when he hears of it, and Mr. Fletcher, instead of re-
89 plying to this letter, writes down to New York to Mr. McHarg. We also introduce in evidence letter from Mr. Fletcher, marked Exhibit 1, showing what Frank Fletcher, as early as April, 1910, what he thought about the purchase of the right of way from the Churchill Lumber Company.

Defendant's Exhibit 12 introduced in evidence, and read.

He has now testified that he has been lumbering up there for two or three years, and this service ought to be continued, because of the fact he was bringing some stuff down from up there. At that time, as early as April 4, 1910, Mr. Fletcher did not want any timber up there at all for a whole year. Now this matter, as I say, I have introduced all the papers in this case, showing the case has been heard and adjudicated, and I take the position this case having been heard and adjudicated in the Alpena circuit court, he cannot now come before the railroad commission with the case again. Judge Emerick has lived there all his life, and is absolutely familiar with all the circumstances. Mr. Fletcher can appeal from his decision; but we say he cannot start this same case in another court. This matter is res adjudicata; that is the position I take. The conditions are identical, and he cannot take up our time again trying the case; that is the position we take in this case.

Defendant's Exhibit 13 introduced in evidence.

Mr. HEMANS: Do you know whether there are any questions resting before a board of this kind which are res adjudicata?

Mr. MCNAMARA: No, I have not been able to find where the same matters, before the same parties, involving the same
90 matter of relief, can be brought up before another court of the same kind.

Mr. FLETCHER: I claim an order of this court—it is simply a hearing before a commission.

Mr. MCNAMARA: Let me show you how unreasonable that is from a legal standpoint. Supposing for instance, you should decide this case against us, and we should feel like appealing to the circuit court; the same case would be in court that Judge Emerick had already decided; he would have this case against us again on a court of concurrent jurisdiction.

Mr. HEMANS: There were two questions I wanted to ask. Is it admitted, as testified by Mr. Fletcher, that there was a revocation from the Churchill Company to the Railway Company, revoking their order to remove the rails?

Mr. MCNAMARA: Yes. That was testified in court. The sale took place—Mr. Kimball went on the stand. We introduced in the evidence I asked from Mr. Fletcher, and he kindly produced in court, a copy of his agreement with the Churchill Company, which was consummated on the 3rd day of August, 1910, between himself and the Churchill Lumber Company. Mr. Kimball did write a letter at the instance of Mr. Fletcher, revoking his prior order, but that letter was dated on the 9th day of August, at a time when he didn't have any right in this property at all. He wrote a letter six days after he had disposed of his rights, revoking an order he had made when he owned the property.

Mr. HEMANS: Now, the other proposition might be an operating proposition more than legal, as to how they were going to remove that last four miles of track when they had taken up an intervening piece.

Mr. MCNAMARA: That's a matter, I don't know how they are going to remove it. They went in there for the purpose of
91 taking it all up, and would have taken it up if they had not been prevented; they would have gotten it up if they hadn't been stopped.

Mr. HEMANS: Was this question in the case, as to whether by injunction they could compel what amounts to mandamus, to compel them to put down the track?

Mr. MCNAMARA: Yes, that was understood.

I suppose that this plea that I interpose—I didn't want to take any part in the case, any more than presenting my plea, the same as I would demur in court to the jurisdiction of the court, and I presume the practice would be at any court. I don't know how it is before the commission, but if the commission arrives, when considering this matter, if they arrive at the conclusion that my plea in bar is not well taken, they will notify me if we desire to put in proof, either to put it in or not to put it in. In other words, we should stand on the plea in bar, or stand on our demur- in the plea. That is simply a suggestion I make to the Commission; whatever the commission does.

CHAIRMAN: Mr. McNamara, could you tell us whether or not it is the custom in making contracts with parties for the furnishing of right of way and tying and grading, etc., where the company may lay the rails, what the conditions are?

Mr. McNAMARA: I think Mr. Fletcher will agree with me, Mr. Gilchrist went on the stand. He is the oldest lumber dealer up *their* alive, and he testified that this is the arrangement:—If a lumberman has a tract of timber up there, and he wanted a branch built to get it out, he would go to the railroad company and tell them he had so much timber up there, and tell them he would like to have a spur built in to it for the purpose of getting that out. And Mr. Kimball testified, and Mr. Richardson testified in this case, they guaranteed the railway company about 2,000,000 feet a mile
92 for putting that in. That is the general custom, and if they had timber up there, and the railroad company then satisfied itself they had such timber, they would ask the lumberman to get the right of way, either by purchase or lease—it wouldn't make any difference to the railroad company—and they get the right of way and grade and tie the roadbed, and then the railroad company would lay the steel. I think that was the custom.

CHAIRMAN: What I wanted to get at was, what warrant Mr. Hawks had in requiring Mr. Fletcher to deed this right of way to the Detroit & Mackinac.

Mr. McNAMARA: There has been a great deal of contention over this branch. Mr. Kimball had owned the branch, and made a charge for shipments over it to others. A small jobber wouldn't go in on that line if he had to pay 50c. a thousand for shipping, over and above the regular rates for the shipment, and then pay for banking grounds besides.

Mr. FLETCHER: The timber is all let. It's a question of the men who own timber in there today, of getting their stuff out. It didn't lower the tariff of the railroad company at all. If Mr. Kimball had put $9,000 into that, and the other four parties who own lumber in there put in nothing, he had a right to have some arangement to get part of his money back. The fact that he attempted to get 50c. a thousand, and only got it from one, doesn't affect the railroad company.

Mr. McNAMARA: We insist that that branch cost us so much. You answer: Yes, it did, but you got the profit on hauling. So it is with Mr. Kimball. It cost him so much to grade and tie it, and he got his lumber out and his profit on its sale. He ought to be satisfied with that if we had to be satisfied with it.

Mr. FLETCHER: It was stated I had no negotiations with the railroad company. Two, three years ago Mr. Luce, as general superintendent of the railroad company, and myself, *talking* over
93 the matter of getting out *of* my timber in that country, and I told him at that time that we should want to haul our timber out over the Tubbs Branch, and when he got through with Kimball, we were ready to do business. That was our testimony; I swor*t* to it in the other case, and it was not dictated.

Mr. McNAMARA: As early as April 4, 1910, you had not made up your mind whether you were going to take it out at all. I was going to say, Mr. Glasgow, I am entirely familiar with the way these branches are built for the railroad company. Mr. Luce is the general superintendent. He has no authority whatever to build any

branch or a foot of branch, without the approval and consultation with Mr. Hawks, the vice-president of the road. A man wants a road and refers it to Mr. Luce, Mr. Luce refers it to Mr. Hawks. I don't think Mr. Fletcher ever had a branch built in his life when he didn't talk with Mr. Hawks about it. Mr. Hawks has absolute authority, so far as that is concerned.

CHAIRMAN: Was there a log tariff in effect covering these logs at the time the rails were removed?

Mr. MCNAMARA: The railroad company had canceled it, and had given orders along the line of the road, they were to take no stuff in on the Tubbs Branch.

Mr. FLETCHER: We contend the changing of station list did not cancel the tariff.

CHAIRMAN: The question I wanted to raise was, whether Mr. Hawks had expected to exact a larger rate, and if so, why, than was named in that tariff. Was it suggested by the questions of Mr. Hawks to Mr. Fletcher, as to what rate he would expect to pay if the service was continued?

Mr. MCNAMARA: No.

Mr. FLETCHER: If the question comes up on its legal merits at all, I would like to file a brief prepared by Frank W. Scott,
94 and I would also like to present a case that has just been presented in the United States supreme court.

Complainant's Exhibit 11 introduced in evidence.

Mr. COGSWELL: I did want to ask Mr. McNamara a question or two, if I might. You said when Mr. Kimball wrote that letter, on behalf of the Churchill Lumber Company, he had no authority to write that letter?

Mr. MCNAMARA: I did.

Mr. COGSWELL: Why didn't he have authority?

Mr. MCNAMARA: Because he didn't own the branch. We had that letter up there, and we had it in evidence at that trial, and Judge Emerick said that he had no right to make such revocation on the 9th day of August, of a notice in land that he didn't own at all at that time.

CHAIRMAN: Was the language of the letter to say, that having sold the property——

Mr. FLETCHER: Yes.

Mr. MCNAMARA: He said at least in the letter, he didn't want the tracks removed. I will tell you what I think he said. I will get a copy of that letter and send it here, if you want it. "That he hereby revoked request for taking up the rails."

CHAIRMAN: That letter was dated and mailed before the track was taken up?

Mr. MCNAMARA: Oh, yes, that was written August 9th.

Mr. HEMANS: You don't claim——

Mr. MCNAMARA: We had a right to take up our track, and he had a right to order it up.

Mr. HEMANS: You are not contending that the order to take it up or order of revocation has anything to do with the merits of the controversy?

Mr. McNAMARA: Not a thing.

95 Mr. COGSWELL: There's one or two things more, if you please, Mr. McNamara. I would like to call attention to the language of Section 22 of Act No. 300, page 28, in Mr. Martindale's Compilation, Section 22, Compiler's Section 81, which states exactly what must be done by the commission upon a complaint in writing. There is nothing in this law, nor any other law, in Mr. Martindale's Compilation of the railroad laws, which mentions any private case, that says that the commission will not have jurisdiction if it has been previously tried by the commission.

Now, I would like to ask you, Mr. McNamara, if you know about the building of the Detroit & Mackinac north of Alpena. What I want to get at particularly is, whether the Detroit & Mackinac ever received any aid by donations of public land, and by private subscription, particularly in building into the city of Cheboygan.

Mr. McNAMARA: I don't know anything about it at all.

Mr. COGSWELL: You don't know whether they did or did not?

Mr. McNAMARA: I don't know anything about it at all.

Mr. COGSWELL: Do you know whether or not they did in the city of Alpena?

Mr. McNAMARA: I don't know that either.

Mr. FLETCHER: I know that, because I helped by subscription.

Mr. McNAMARA: But that wasn't the Detroit & Mackinac. It was the D. B. C. & A.

Mr. COGSWELL: If the original road ever received any public aid or local subscription, and I am quoting from Act 125, page 208. Certain procedure is necessary for them to make abandonment of any of their branches, and I would like to call your attention, to the attention of the commission, on that act.

Adjourned.

96 EXHIBIT C.

File No. 39609.

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne. In Chancery.

To the Honorable the Judges of said Court:

Your orator, the Detroit & Mackinac Railway Company, a corporation organized under the general railroad law, of Detroit, in the county of Wayne, files this bill against the Michigan Railroad Commission under the jurisdiction conferred on the court by Section 23 of the Act entitled, "An Act to Define and Regulate Common Carriers," etc., Public Acts, 1909, p. 704, and humbly complaining respectfully shows unto the court:

(1) That the railroad of your orator lies wholly within the State of Michigan, and is engaged in intrastate commerce; its terminals are at the city of Bay City, on the south, and the city of Cheboygan,

on the north, a distance of 196 miles, which comprises and composes the main line of your orator; that north of Alpena and south of Cheboygan radiating from the main line of said railroad are certain private logging branches built and maintained under special contracts and agreements with lumbermen at Alpena for the
97 purpose of marketing saw logs and lumber not contiguous to the main line of said railroad. That in 1905 a private logging branch was constructed leaving the main line of the railroad of your orator at a point three or four miles west of Millersburg and extending in a southerly direction a distance of about five miles. That said logging branch was and is known as the Tubbs Branch or Martindale Spur, and it was constructed by and for the private use of the Churchill Lumber Company, a Michigan corporation, doing business at the city of Alpena, at which place it owns and operates a large saw mill. That said logging branch was constructed under an agreement between the Churchill Lumber Company and your orator, whereby the Churchill Lumber Company was to procure and own the right of way along said branch or spur, and was to do the grading and furnish and place the ties upon the road-bed ready for the iron which your orator was to furnish and lay, together with such ballasting as might be necessary; the Churchill Lumber Company, being the owner of the land over which said spur was built and your orator being a mere licensee thereon, reserved and had the right in case any other lumberman or timber operator desired to make use of said Tubbs Branch, to make a charge against them for the use thereof; which right the Churchill Lumber Company exercised during the life and operation of said branch, charging other lumbermen in that vicinity fifty cents per thousand feet for hauling out their logs over said branch on the equipment and by the operation of your orator.

And your orator further shows and avers that said branch did not become and never has become a part of the statutory or public railroad of your orator, and was always subject to and under the private control of the Churchill Lumber Company, for which company it was built. That the agreement and understanding at the
98 time said branch was built between the Churchill Lumber Company and your orator was that when the Churchill Lumber Company had exhausted the timber belonging to the said company tributary to the said branch, the said branch would be taken up and the country through which it run abandoned; and your orator avers that said branch is and has always been a mere private logging branch, and that your orator has never used or operated the same as a part of its railroad, and has never become a common carrier thereon and thereover. Your orator further shows that no freight or passenger trains of any kind or description have ever been operated on said branch, and no public business of any kind done thereon; that on the 8th day of June, 1910, the Churchill Lumber Company, having exhausted its lumber operations for which said branch was built, notified your orator that said operations had ceased and that it had cut and shipped out all of its timber contiguous to said Tubbs Branch or Martindale Spur, and requested your

orator to remove its rails from the right of way owned by said Churchill Lumber Company, and to take up said branch. And your orator shows that in compliance with such request it undertook to take up the rails lying upon said branch, and while in the act of removing said rails and tearing up said branch, to-wit: on the 9th completing the taking up of said branch by a writ of injunction issued out of and under the seal of the circuit court for the county of Alpena, in chancery; which said injunction was issued by said court as prayed for in a bill of complaint filed by the Fletcher Paper Company, as complainant, and against your orator, as defendant, in said court.

(2) And your orator further shows that after it had taken up a portion of said Tubbs Branch, and was engaged in the work of taking up the whole thereof, the said Fletcher Paper Company, as aforesaid, filed its bill in the circuit court for the county of Alpena, in chancery; that your orator filed an answer to said bill of complaint, and also a cross bill asking for affirmative relief; that the said Fletcher Paper Company filed its answer to said cross bill, and replications were filed, and the case was heard in the city of Alpena, Michigan, on the examination of witnesses in open court on the 22nd day of November, 1910, before the Honorable Frank Emerick, circuit judge. That the Fletcher Paper Company appeared by its attorneys, and a number of witnesses were sworn by it in support of the allegations contained in its bill of complaint, and after the argument of counsel for both parties, said cause was submitted to the circuit judge for decision; that on or about the 20th day of March, A. D. 1911, the Honorable Frank Emerick, circuit judge in and for Alpena county, after careful consideration of the pleadings and proofs taken in open court, and the arguments of counsel, and briefs submitted therein, filed an opinion in said cause dismissing the bill of complaint filed by the Fletcher Paper Company; a copy of which said opinion is hereto annexed, marked Exhibit "A," and made a part of this bill of complaint.

(3) Your orator further shows that after the submission of said cause to the circuit court for Alpena county, in chancery, the Fletcher Paper Company on, to-wit: the 18th day of January, 1910, filed its complaint with the Michigan Railroad Commission at Lansing, Michigan, setting up the same facts as were contained in the bill of complaint filed in the Alpena circuit court, and asking for precisely the same remedy as it asked in its bill of complaint filed in the Alpena circuit court; that the action started before the Michigan Railroad Commission by the Fletcher Paper Company was precisely similar to the action already pending before the circuit court for Alpena county, in which pleadings and proofs had already been submitted to the circuit judge. That shortly thereafter your orator filed an answer to the bill of complaint filed before the Michigan Railroad Commission, in which it set forth the fact of a prior suit pending involving the same issues for and against the same parties, and asking for precisely the same remedy, insisting before said railway commission that it had no power or authority to review the decision of the judges of the circuit court of this state,

or overrule the same, and that the entire matter was and had become res adjudicata. Your orator further shows that on the 24th day of March, 1911, a hearing was had upon such complaint before the Michigan Railroad Commission at Lansing, Michigan, at which hearing your orator introduced certified copies of all the pleadings in the former case in the circuit court for Alpena county, together with a copy of the opinion of the circuit judge dismissing said bill of complaint, which was and is precisely similar to the complaint filed and then pending before the Michigan Railroad Commission. That your orator on said hearing insisted that the Michigan Railroad Commission was not vested or clothed with any power or authority whatever under the law of this state or any other state to review or set aside the decisions of the circuit judges and the circuit courts of this state, and asked that it might be permitted to put in testimony in said cause, providing the Michigan Railroad Commission decided that it had authority to hear said cause even though it had already been decided by the circuit judge of the Alpena circuit court.

Your orator further shows that after said hearing, which was held at Lansing on the 24th of March, 1911, your orator wrote to
191 the Michigan Railroad Commission, calling attention to the fact that it was understood at said hearing that if the commission desired to hear evidence on the part of the defendant, it would be given an opportunity to present its case to the commission. That on the 7th day of April, 1911, in answer to said letter, the Michigan Railroad Commission, through its chairman, Mr. C. L. Glasgow, wrote to the general attorney of your orator as follows:

"We have your favor of the 4th calling attention to the conversation had with the writer relative to your appearance before the commission in the case of the Fletcher Paper Co. vs. the D. & M. Ry., also reciting the conditions under which that matter was heard. We also note the attached letter from Mr. Hawks and wish to assure you that no advantage will be taken of the conditions as set forth by Mr. Hawks wherein you were not permitted, or, rather, wherein it was indicated to you that it would not be necessary to have any witnesses for when the commission comes to review this case if in their judgment they feel they have jurisdiction and desire to pass upon the facts presented you will be notified, and if it is your desire a further hearing will be granted for the purpose of allowing you to make such showing.

"We thank you for your complete and honest presentation of this question and can assure you that you will be fully protected as against any advantage that may be taken."

(4) Your orator further shows that without any further notice or hearing to your orator on, to-wit, the 3rd day of August, 1911, the Michigan Railroad Commission on said complaint made to it by the Fletcher Paper Company, as herein before set forth, issued its order against this defendant requiring it on or before the expiration of sixty days from the date of said order "To relay the rails removed by it from the so-called Tubbs Branch, or Martindale Spur, and to

accept the shipments offered to it on said branch by the com-
102 plainant, the Fletcher Paper Company, and to grant to said Fletcher Paper Company the same facilities heretofore granted by said Detroit & Mackinac Railway Company to the Churchill Lumber Company, and to such other persons, firm or corporation as have been granted rights of shipment over said Tubbs Branch, or Martindale Spur." That a certified copy of said order issued by the railroad commission on the 4th day of August, 1911, was served upon your orator upon the 7th day of August, 1911, at the city of Detroit, Michigan.

(5) That said Tubbs Branch is more than two miles in length, and it is not practically indispensable to the successful operation of the industry or enterprise of the Fletcher Paper Company, and no offer has been made to pay to your orator the expense of relaying the rails so taken up, or the cost and expense of the rails still remaining in place on said Tubbs Branch, and no attempt whatever has been made on the part of the Fletcher Paper Company to comply with sub-section B of section 6 of said act; that said Fletcher Paper Company has never made any attempt to come to an agreement or understanding with your orator about the transportation of timber and logs by your orator for said Paper Company on said Tubbs Branch, and has never informed your orator as to the amount of timber to be transported for the Fletcher Paper Company over said Branch, or when the timber would be cut and transported.

(6) Your orator further shows that at no time has the Fletcher Paper Company, or any of its officers or agents, conferred with your orator with reference to any timber that it might have lying contiguous to the so-called Tubbs Branch, for shipment or transportation over said branch into the city of Alpena. That it has no knowledge whatever as to the amount of timber that the said
103 Fletcher Paper Company may own or control in said vicinity or whether it owns or controls any timber or not; that said Fletcher Paper Company has never, by its officers, agents or attorneys, consulted with your orator or asked your orator to ship or transport any logs over said branch to its mills in the city of Alpena, and has never assured your orator that if said Tubbs Branch was in operation that it would secure five carloads or ten carloads, or a hundred carloads of logs per year, or whether it was necessary that said branch should be left and operated at great financial loss and expense to your orator for one year or thirty years, or a hundred years; and that the order of the Michigan Railroad Commission especially compelling your orator to operate said branch is against the just rights of your orator and if put into effect would work irreparable loss and injury to the revenues of this railroad company.

(7) Your orator has been advised, and respectfully submits that if the said act is construed so as to apply to private logging branches like the Tubbs Branch, and to authorize the Michigan Railroad Commission to exercise jurisdiction over the same, then the said act and the proceedings of the said commission thereunder is in conflict with the due process of law and the equal protection of the law clauses of the fourteenth amendment of the constitution of the United States.

Prayer for Relief.

Your orator prays that the Michigan Railroad Commission may be required to answer this bill, paragraph, by paragraph, answer under oath being hereby expressly waived, and that the said order
104 of said commission of August 3, 1911, may be decreed and declared to be null and void, and that your orator may have such other and further relief as equity and justice may require.

Prayer for Process.

Your orator prays that process for the appearance of said Michigan Railroad Commission may issue according to the rules and practice of the court, and that writs of injunction may be issued temporarily and perpetually enjoining the Michigan Railroad Commission from enforcing or attempting to enforce said order of August 3, 1911. And your orator will ever pray.

THE DETROIT & MACKINAC RAILWAY COMPANY,
By J. D. HAWKS,
Vice-President and General Manager.

JAMES McNAMARA,
Solicitor for Complainant.

1233 Majestic Building, Detroit.

(Verified in usual form.)

105 STATE OF MICHIGAN:

The Circuit Court for the County of Alpena. In Chancery.

No. 1423.

FLETCHER PAPER COMPANY
vs.
DETROIT & MACKINAC RAILWAY CO.

Opinion of the Circuit Judge.

In the year 1905, the Churchill Lumber Company, of Alpena, was the owner of a tract of land estimated to cut about 12 million feet of timber, situated about five miles south of defendant's main line in Presque Isle County, and these parties entered into verbal contract providing for the transportation of such timber to Alpena.

The arrangement made was that the Churchill Lumber Company was to procure and own a right of way from the main line of defendant to, and through the timber, was to grade and tie such right of way, and the defendant was to place its rails thereon and haul such timber to its place of manufacture.

The agreement was carried out. The Churchill Lumber Company bought or leased the entire right of way, graded and tied the same, upon which defendant laid its rails, and proceeded with hauling the timber.

Complainant, Lobdell & Churchill Co., of Onaway, and the Embury-Martin Co., of Cheboygan, also owned standing tim-
106 ber near this branch railroad which they desired defendant to haul over the same.

At first the Churchill Lumber Company objected to defendant's placing cars for these people and hauling their timber over this branch, but, ultimately, permitted this, but compelled these other timber owners to pay 50 cents per thousand feet for all timber hauled over this branch, which had come to be known as the "Tubbs Branch."

The defendant, thereupon, established and published tariffs, or freight rates, from points on this branch to other points upon its lines.

The arrangement between the Churchill Lumber Co. and defendant continued until June 8, 1910, when it formally notified defendant in writing (Exhibit 3) that all of its timber, covered by the contract, had been cut and hauled, that the land had been sold upon contract to various persons who desired the tracks removed, and that defendant must remove its rails from the right of way with all convenient speed.

As some of the other timber owners had logs skidded along portions of the branch, the defendant made some delay.

On August 3, 1910, the Churchill Lumber Co. sold and assigned to complainant its ownership in the right of way, and the unpaid balances due from the other timber owners for such logs as had been hauled over the branch; and on August 9, 1910, notified defendant of such assignment, whereupon defendant cancelled its published tariffs from points on this branch.

The complainant knew when it purchased the right of way that the Churchill Lumber Co. had notified defendant to remove its rails therefrom.

On September 9, 1910, the defendant began taking up its rails, and had removed about one-half mile, when restrained by the preliminary injunction issued upon filing the present bill of
107 complainant, which prays for the mandate of this court compelling defendant to restore the track and operate the branch railroad.

The most tangible argument advanced by complainant for the relief prayed is that defendant, by making a schedule of tariffs for points on this Tubbs Branch, has thereby constituted the same part of its, and the state's general railway system and the same must remain indefinitely.

As between the owner of the right of way and defendant the original construction and subsequent operation of this branch was purely a matter of private contract.

And the establishment of fixed freight rates for others could not change such contract relations on either side.

Suppose defendant, on receipt of the notice to remove its rails, had replied: "True, the timber covered by our contract has all been cut and hauled, and the contract by its intent and terms ended, but we have established freight rates for the other people for whom we have hauled, and this entitles us to continue the road over your right of way for our, and their, use indefinitely."

This contention would not be sustained for one moment, but it is the exact converse of complainant's position.

I do not think complainant is entitled to the relief prayed for in its bill of complaint, which, therefore, will be dismissed.

FRANK EMERICK,
Circuit Judge.

108 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 14th Day of January, in the Year of Our Lord One Thousand Nine Hundred and Thirteen.

Present, the Honorable Joseph H. Steere, Chief Justice; Joseph B. Moore, Aaron V. McAlvay, Flavius L. Brooke, Franz C. Kuhn, John W. Stone, Russell C. Ostrander, John E. Bird, Associate Justices.

No. 25373.

MICHIGAN RAILROAD COMMISSION
vs.
DETROIT & MACKINAC RAILWAY COMPANY.

This cause coming on to be heard is argued by Mr. Gillett for Relator and by Mr. Baker for Respondent and duly submitted.

109 *Opinion.*

Filed December 20, 1913.

State of Michigan Supreme Court.

MICHIGAN RAILROAD COMMISSION, Relator,
vs.
DETROIT & MACKINAC RAILWAY COMPANY, Respondent.

Before Steere, C. J.; Moore, McAlvay, Brooke, Stone, Ostrander, J.

MCALVAY, *J.:*

This is an application by the Michigan Railroad Commission for a writ of mandamus to enforce an order made by it in the matter of the Fletcher Paper Company vs. the Detroit & Mackinac Ry. Co. to remain in force until the hearing and final determination of a cause now pending in the Circuit Court for Wayne County, In Chancery.

The order was granted on the petition of the Fletch- Paper Company of Alpena, the owner of logs and timber located along the line

of what is know- as the "Tubbs' Branch" or "Martindale Spur," and also the owner of the right of way, roadbed and ties of this spur upon which the rails of the company are laid, which is a logging branch of the respondent railroad company, and which leaves the main line of road at a station called "Case," and extends about five miles in a southerly direction from that point.

The Fletcher Paper Company was engaged in delivering its logs along this branch road and shipping them to Alpena or other points on the railroad company's main line and had a large amount of logs on the skidways along the track about one mile south from the main line ready for shipment, when the railroad company, without notice, took up about half a mile of its rails between the point where
110 these logs were placed for loading and the main line, making it impossible to make any further shipment.

The railroad company had operated its cars over this branch road for several years, transporting forest products of those having such along the branch for shipment, and had established schedules of rates for the same, which were duly filed with the Michigan Railroad Commission and published, and it operated this branch in the same manner as it operated many other branches of like character in that territory. It had notice of the Fletcher Paper Company's purchase of the right of way, roadbed and ties of this branch from the Churchill Lumber Co., and af-erward for some time accepted and transported its logs from this branch according to schedule rates without question.

The Fletcher Paper Company as soon as these rails were removed filed its bill of complaint in the Circuit Court for the County of Alpena, In Chancery, for the purpose of restraining the railroad company from taking up its rails on this branch and enjoining it to continue to operate this spur and haul out the Fletcher Paper Company's logs to and on its main line and deliver them at its mills in Alpena County.

The hearing of the issue joined in that case resulted in a decree dismissing the bill of complaint, but without prejudice to complainant to file its petition for relief with the Michigan Commission.

Thereupon the Fletcher Paper Company filed such a petition with the Commission, which proceedings resulted in the granting of the order the enforcement of which is sought in these mandamus proceedings.

For the purpose of a clear understanding of the facts in this case, as found by the Michigan Railroad Commission, from the evidence before it, in making the order in question granting
111 the relief asked for by the Fletcher Paper Company, we embody herein the opinion and order of the Railroad Commission:

"Opinion.

"By Commissioner HEMANS:

"The facts disclosed by the complaint, answer and proofs in the above entitled matter, are as follows:

"In the year 1905, the Churchill Lumber Company, of Alpena, was

the owner of a tract of timber lands, located in Presque Isle County, extending some five miles south of Case, a station on the main line of the Detroit & Mackinac Railway, the defendant herein. The owner, desiring to cut the timber, effected an arrangement with the defendant for railroad facilities, whereby the logs could be transported to Alpena. The contract which the parties made was a verbal one, providing in substance that the Churchill Lumber Company was to procure a right-of-way from the main line of defendant company to and through the timber lands. It was to grade the right of way and place the ties, and the defendant railway was to lay its rails thereon, and haul the forest products to the lumber company's place of manufacture. The agreement was fully consummated, and the road placed in operation during the year 1905. It has since been known as the "Tubbs Branch" or "Martindale Spur."

"It is important to note that the contract, or agreement by which this particular branch road was constructed, was not exceptional in character, but both as to its form and provisions it was in keeping with the custom that was then and is still followed by the defendant, and by such other roads as engage in the transportation of forest products from the place of their severance to the places of manufacture. The magnitude of the lumbering operations, the great extent of timber tracts required to keep mills running, and economic operation have necessitated the construction of branches and spurs from the main line of such roads which traverse the timber sections into the adjacent forests. In many instances, such roads have been constructed by the lumber companies, are private in character, and are by the statutes creating this commission, excepted from its supervision or control. In other instances, as in this case, the branches have been both constructed and operated as appendages to main line. In such cases, as the evidence discloses, it is the custom of both the defendant and other railroads, in the sections, to construct such spurs and branches into the timber tracts; the roads requiring the lumbermen to procure the right of way, to make the grade, and place the ties, while it places the rails and transports the woodmen's harvest. These agreements between carrier and lumbermen have been quite generally left in parol, but the evidence offered by the defendant suggests nothing in modification of the claimed terms of such construction, except that it was the custom of the defendant before entering into such agreements to ascertain that the shipper had timber contiguous to a proposed branch equal to at least two million feet per mile of road to be constructed.

112 "The construction of the "Tubbs branch," so far as the defendant participated in it, and its subsequent operation by it, was therefore not an isolated case, but one of many of like character. The branch was ultimately constructed at a total length of something more than five miles. There were several proprietors owning timber contiguous to the branch. The Churchill Lumber Company, at whose instance the branch was constructed, owned from twelve to fourteen million feet. There were other extensive holdings by the Lobdell & Churchill Company, of Onaway, Embury-Martin, of Cheboygan, while the complainant was the owner of more than

twentyone million feet, the transportation of which was to be facilitated by the branch in question.

"Between the establishment of the branch and the 8th of June, 1910, the Churchill Lumber Company cut and shipped out all of its timber contiguous to the Tubbs Branch, and on the date last mentioned apprised the defendant railway company of this fact, and requested the removal of the rails from the right of way. At this time the complainant, and the Lobdell & Churchill Company had camps actively engaged in lumbering operations on their respective properties and were shipping considerable quantities of logs over the branch, on the published tariffs of the defendant company.

"The records of this department disclose that from the creation of the department, the defendant through its public tariff files, has recognized this branch as a part of its general transportation system. (See M. R. C. No. 76, M. R. C. No. 250, M. R. C. No. 265, M. R. C. No. 274, M. R. C. No. 277, M. R. C. No. 279, M. R. C. No. 303.) The proofs disclose that under such tariffs, during a period of three years previous to the arising of the difficulty in question, the complainant offered and had transported over the Tubbs Branch to Alpena, logs to the extent of one million, three hundred thousand feet, while other extensive shipments were likewise made by the Lobdell & Churchill Company, and the Embury-Martin Company.

"During the year 1908, forest fires killed between five and six million feet of timber belonging to complainant adjacent to the branch in question, and in the winter of 1909 and 1910, complainant began preparation for the cutting of this and other portions of the tract. Notwithstanding the notice of the Churchill Lumber Company, of June 8th, above referred to, the defendant continued to transport the logs of complainant, and on August 3, 1910, the complainant acquired from the Churchill Lumber Company for a consideration of four thousand dollars, all the right of the latter concern to the right of way and ties of the Tubbs Branch, so that so far as the physical property of the road was concerned, the complainant thereafter stood in the same relation to it that the Churchill Lumber Company had occupied, and in the same relation that all other companies stand to railroad branches for which they have furnished the right of way and ties, and the railroad companies have furnished rails. The Churchill Lumber Company at once, upon effecting the sale to compla-nant, by letter apprised defendant of the fact of such sale, and requested that the rails be not removed. The defendant company thereafter continued to accept shipments from complainant over the branch until the 9th day of September following. Between August 3 and September 9th, more than one hundred thousand feet of logs being transported. On the latter date, the defendant, without notice to complainant, took up about one-half mile of rail from the branch, beginning about one-half mile from
113 *of rail from the branch, beginning about one-half mile from* the main line, and extending nearly to the skidway upon which the complainant had at the time approximately one hundred and forty-five thousand feet of logs, skidded and ready for shipment, while three hundred and seventy-five thousand feet more were upon

the rollways in the adjacent forest. On the very forenoon of the day the rails were torn up shipments were made for complainant under tariffs that were then and that continued thereafter in force. The complainant thereafter made a formal request that cars be placed and his shipments accepted. With this request the defendant refused to comply, leaving the rails piled by the right of way, and insisting that the tariff applicable to the branch had been cancelled by eliminating the same from the station list. As under the law, tariffs cannot be cancelled except upon notice to this commission, there is no force to this contention.

"Upon being apprised of the action of the defendant in removing the section of rail from the branch, the complainant filed a bill of complaint against defendant in the circuit court for the county of Alpena in chancery. The bill sought to enjoin the defendant from removing further rail from the branch, and to compel it to replace those already removed, and to accept the shipments offered by complainant. While the above cause was pending, complaint was filed with this commission. At the hearing, the defendant offered the record of the proceedings in the Alpena circuit court in chancery as a bar to the proceedings herein. The decree in the chancery case had not at that time been entered, and has subsequently been added to this record. The decree dismisses the bill of complaint, and provides in terms that it is "without prejudice to complainant to file its petition for relief with the Michigan Railroad Commission." Even as between courts bound by the strict rules of legal procedure, such a decree could not be effectually pleaded in bar of some subsequent action, unless it appeared that the latter case was identical with the former case upon the facts presented and that the power of the courts to grant relief was the same in both instances.

Story Equity Pleadings, 793;
County of Mobile v. Kimball, 102 U. S. 691;
Newberry vs. Ruffin, 102 Va. 73.

"Numerous cases could be cited giving far greater scope to the words "without prejudice" than is contended for them here. The court in the case of O'Keefe vs. Irvington Co. 87 Md. 199, among numerous citations quoted approvingly from N. Pac. R. R. Co. vs. St. P. R. R. 47 Fed. 536, to the effect that when the qualifying words "without prejudice" are used, the effect is "like a nonsuit in a common law action." We are therefore clearly of the opinion that the decree in the chancery court can in no manner be said to be a bar to this proceeding, and however *familiar* (similar) the two proceedings may be upon the precise facts involved, there is a marked dissimilarity in the powers of the court and this commission, in the application of a remedy to any wrong which the facts may disclose.

"Prior to action by this commission in the premises, the power of the chancery court was, and still is, limited to the enforcement of these clear legal or equitable rights embraced within the general equity jurisdiction of the court. Needless to say, this jurisdiction does not comprehend the power to decree regulations that are ad-

ministrative in character, such as the legislature has delegated through the act creating the Michigan Railroad Commission.

114 While the courts, through a bill in chancery, have certain jurisdiction over the orders of the commission, they may not, in the first instance, pass upon the reasonableness of maximum rates of charges for the transportation of property, or upon the innumerable questions growing out of the rate making power, and the preventing of discrimination.

"Section 22, of Act No. 300 of the Public Acts of 1909, being an act which among other things defines the powers and duties of the Michigan Railroad Commission, provides:

"Upon complaint in writing of any person, firm or corporation or association, or of any mercantile, agricultural or manufacturing society, or of any body politic or municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property or any service in connection therewith, is in any respect unreasonable or unjustly discriminatory, or that any service is inadequate, the commission shall notify the common carrier complained of * * *"

"After providing for hearing and investigation, the section further provides:

"If, upon such investigation, the rate or rates, joint rate or rates, fares, charges or classifications, regulations, practice or service complained of shall be found to be unreasonable, inadequate, or unjustly discriminatory, the commission shall have power to and it shall determine and by order fix and order substituted therefor, such rate or rates, joint rate or rates, fares and charges, as is or are just and reasonable, and which shall be the maximum to be charged in the future, and such classifications, regulation, practice or service as is or are just, reasonable and adequate, and which shall be imposed and followed or service rendered in future in lieu of that found to be unreasonable, inadequate or unjustly discriminatory, and in either case the commission shall make an order that the common carrier cease and desist from such violation and shall conform to the regulation and practice so prescribed."

"None of the foregoing powers are committed to the jurisdiction of the chancery court. That court, in this controversy, exercised its powers in determining the property rights of the parties. This commission exercises its powers in determining the reasonableness or unreasonableness of the discrimination, regulation and practices complained of.

"In seeking for guidance in determining the extent and limitations of its powers, this commission naturally looks to the decisions of the Interstate Commerce Commission. The act to regulate commerce, under which that body exercises its authority, by its terms limits the commission to the prescribing of just and reasonable rates, but without the broad language of the Michigan statute. The Interstate Commerce Commission has said, speaking of its powers, "We think that the commission has full power to remove unjust discrimi-

nation resulting from a rule or practice, as well as that resulting from a rate." (Overbacker Coffee Co. vs. Southern Ry., 18 I. C. C. Rep. 570).

115 "In another case they have very truly said, "There is no more insidious and effective way by which a carrier may discriminate between its shippers than through a regulation or practice that denies them the equal enjoyment of its facilities." (Rail & River Coal Co. vs. B. & O. R. R. 14 I. C. C. 86).

"As a few instances of what the Interstate Commerce Commission has dec-ared to be discrimination, it is of interest to note the following:

"The practice of a railroad allowing more free time for the unloading of cars in one city than in another. (Lynch & Reed v. B. & O. R. R., 18 I. C. C. Rep. 38).

"For a railroad to build and rent an elevator for a nominal rental to an individual in one city, while it requires the individuals of *an* neighboring city to provide *its* own. (Brooks-Rauch Mill & Elevator Co., vs. M. P. Ry. Co., 17 I. C. C. Rep. 158).

"For a railroad to bear a part of all of a cartage charge upon freight brought to it by distant shippers, while refusing to bear no (any) part of the cartage charge from shippers near at hand." (Stone & Carter vs. D. G. H. & M. Ry., 3 I. C. C. Rep. 613).

"The first chairman of the Interstate Commerce Commission, the distinguished Thomas M. Cooley, speaking for the commission in the case of Kruse vs. Richmond, Danville R. R. Co., 1 I. C. C., 426, said: "Discrimination must consist in the doing for or allowing to one party or place what is denied to another."

"It will hardly be contended that the action of the defendant, in placing its rails upon the ties and right of way of the Churchill Lumber Company, and upon the right of way and ties of other lumber companies, and granting the use of its railway facilities as they have use for them, and then ruthlessly tearing out the rails and refuse the same facilities to complainant, does not come clearly within this definition. In the exercise of its franchise it is the duty of a railway company to so adjust its tariffs and so regulate its practices that unjust discrimination shall not result. The defendant, therefore, may not refuse to one shipper the facilities which it grants to another under conditions which are practically identical.

"It is the opinion of the commission that the defendant company should re-lay the rails removed by it from the so-called "Tubbs Branch" or "Martindale Spur" and accept for transportation on said branch the shipments tendered by complainant; that said tracks should be relaid on or before thirty days from this date, and an order to this effect will be entered.

"C. L. GLASGOW, *Chairman.*
"G. W. DICKINSON, *Commissioner.*
"LAWTON T. HEMANS, *Commissioner.*"

Order.

"STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

"Session of the Michigan Railroad Commission Held at Its Offices, in the City of Lansing, on the 3rd Day of August, A. D. 1911.

116 D-163.

FLETCHER PAPER COMPANY, Complainant,
vs.
DETROIT & MACKINAC RAILWAY CO., Defendant.

"This matter having come on to be heard upon complaint and answer, and proofs having been taken before the commission, and the said proofs and briefs of the respective parties having been duly considered:

"It is ordered, that the said defendant, the Detroit & Mackinac Railway Company, be, and is hereby required on or before the expiration of thirty days from the date hereof, to re-lay the rails removed by it from the so-called "Tubbs Branch," or "Martindale Spur," and to accept the shipments offered to it on said branch by the complainant, the Fletcher Paper Company, and to grant to the said Fletcher Paper Company the same facilities heretofore granted by said Detroit & Mackinac Railway Company to the Churchill Lumber Company, and to such other person, firm or corporation, as *have* been granted rights of shipment over said "Tubbs Branch," or "Martindale Spur."

"C. L. GLASGOW, *Chairman.*
"C. W. DICKINSON, *Commissioner.*
"LAWTON T. HEMANS, *Commissioner.*"

The hearing of the petition of the Fletcher Paper Company before the Railroad Commission was had March 24, 1911. The order in question was made August 3rd, 1911. It was duly served on respondent railroad company August 8th, 1911.

On September 2nd, 1911, the railroad company filed its bill of complaint in the Circuit Court for the County of Wayne, In Chancery, to review, vacate and annul said order, which cause was pending at the time this mandamus proceeding was instituted and is still pending in said court.

Respondent contends that the instant case ought not to be considered and passed upon by this court for the reason that it had no opportunity to present its proofs at the hearing before the Railroad Commission, and claims that on said hearing it relied upon its contention that the decree of the Alpena Circuit Court, In Chancery, dismissing the bill of complaint of the Fletcher Paper Company against respondent was res adjudicata and therefore a bar to the

proceedings before the railroad commission, and that it was
117 understood at the time, and by correspondence later, between it and the said Commission that if that question was decided adversely to it, opportunity would be given to introduce evidence in this proceeding, should it so desire, and that it received no such notice; that the first knowledge it had of the decision by the Commission was the service upon it of a copy of the order of August 3rd.

The record indicates that such an undertaking was had, but it is denied in the brief of counsel for petitioner that no notice or opportunity was given to respondent to furnish proofs in the case, and no such claim appears to have been made to the Commission after the order was promulgated and before the bill to review the order was filed. The respondent at no time has presented any statement of the nature of the testimony it at that time desired to introduce, or any statement of merits which it could show by such proofs, or that in fact it expected and desired to put in further or other proofs and exhibits than are shown by the testimony returned in the record.

Further, the answer of respondent admits all of the material facts charged against it in the petition upon which petitioner relies for the relief asked of the Railroad Commission. Admitting the truth of its contention, it is apparent that no injury to defendant has been done in the neglect to notify it according to agreement.

The further claim is made by respondent that the several allegations in its answer to this petition in this case must be accepted as true because it is not traversed or denied and no issue of fact are framed.

This answer is voluminous, and includes the pleadings and testimony in the proceedings before the Railroad Commission, the bill of complaint in the Alpena case and the answer thereto; the bill of complaint filed in the Wayne Circuit Court, and also
118 the opinion of the Alpena Circuit Judge.

It is claimed by petitioner that these matters are irrelevant and immaterial and that issue need not be joined upon such matters.

This court has held that improper and irrelevant allegations contained in an answer of a respondent to an order to show cause will not be stricken out upon motion, and has pointed out the practice to be to call the attention of the court to such matters.

Erickson vs. Alpena Circuit Judge, 138 Mich., 108.

In the instant case that practice has been followed, and we are of opinion that the bill of complaint in the Wayne Circuit Court and the opinion of the Alpena Circuit Judge are immaterial and require no consideration, and that the transcript of the testimony taken before the railroad commission on the hearing of the petition for the order of August 3rd, 1911, gives all the information necessary upon this hearing relative to the bill of complaint and answer in the Alpena chancery case, and that it was not necessary to embody those records in the answer of respondent.

The pleadings in the instant case, the pleadings and testimony

returned in the matter of the application of the Fletcher Paper Company against respondent for an order to enforce the order of August 2nd, 1911, pending its review, are all that this court needs to consider. It was, therefore, not necessary to frame issue upon the respondent's answer.

We are not called upon to consider and determine the merits of the controversy between the Fletcher Paper Company and respondent railway company upon the order of August 2nd, 1911.

Such questions are involved in the case now pending before 119 the Circuit Court for the County of Wayne, in Chancery, wherein the respondent railway company seeks to review, annul and set aside said order. The sole question before this court in this proceeding is whether the order of the Railroad Commission shall take effect and become operative pending the hearing and determination of that chancery cause.

The Michigan Railroad Commission assumed jurisdiction and passed upon the matters in controversy between the parties in the proceedings then before it and its final determination rendered in the order in question, assuming and claiming to act under and by virtue of the power and authority granted to it under section 22 of the Railroad Commission Law.

It will not be necessary to quote the provisions of that section at length. The Commission is authorized to hear all complaints relative to rates, joint rates, charges or classifications that are charged to be in any respect unreasonable or unjustly discriminatory, or "any regulation or practice whatsoever affecting the transportation of persons or property, or any service in connection therewith which is in any respect unreasonable or unjustly discriminatory," and if on investigation such charges are found to be true, it is authorized to determine and by order fix such rates and charges as are just and reasonable and such regulation, practice or service as is just, reasonable and adequate "and which shall be imposed and followed or service rendered in future in lieu of that found to be unreasonable, inadequate or unjustly discriminatory, and in either case the commission shall make an order that the common carrier cease and desist from such violation and shall conform to the regulation and practice so prescribed."

Relative to an order made by the Commission the Court has said:

119 "Its findings are not conclusive but have the effect of establishing prima facie that the rates considered are reasonable and just and therefore lawful or unreasonable and unjust and unlawful. Its orders stand, until modified or set aside by it or by the courts, * * * Presumptively the findings and orders of the Commission are right. If attacked the complainant has the burden of showing by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable as the case may be."

Detroit & Mackinac Ry. Co. v. Railroad Commission, 171 Mich., 335, at p. 346.

The Commission in its opinion said:

"This Commission exercises its powers in determining the reasonableness or unreasonableness of the discrimination, regulation and practices complained of," and found and determined that the practices of the respondent were unjust and discriminatory in refusing to the Fletcher Paper Company the facilities which it granted freely to others under conditions practically identical.

The contention of respondent, reduced to its lowest terms, is that the order in question is confiscatory. This is often, if not in fact generally, one of the objections of the common carrier railroad company in contesting the rate fixed in ordinary rate cases, as was contended in St. & M. Ry. vs. Railway Commission, supra.

The petitioner in the instant case before the Railroad Commission offered, and upon this hearing before this court keeps such offer good, to indemnify respondent for all costs and expenses incurred in re-laying the track taken up by it, with interest, and to pay all rates that may be fixed or charged by the railway company and approved by the commission, in case this order is vacated and set aside by the Wayne Circuit Court, in Chancery, or in this court if an appeal is taken. This indemnity would save respondent harmless from any possible loss in complying with
821 the order and save petitioner from claimed irreparable damage to 21,000,000 feet of forest products during the probable term of years occupied in this litigation.

It has been held by this court that an order of the railroad commission is enforcible by mandamus, although a proceeding in equity to review it is pending.

Michigan Railroad Commission vs. Michigan Central Railroad Company, 159 Mich., 340.

This order is prima facie not unreasonable. There is no question but that the legislative intent clearly expressed in this statute was that the orders of the commission should be and continue in force during all subsequent proceedings until modified or set aside by the commission or by the courts.

The statute provides a remedy by mandamus to enforce the orders of the commission, and this court has granted such writs. Upon the facts presented the writ should be granted in this case.

Upon furnishing bond to the petitioner before the Railroad Commission, The Fletcher Paper Company in the penal sum of $10,000 to indemnify respondent in manner and form as herein stated, with two sureties to be agreed upon between the parties, or approved by the clerk of this court, a writ of mandamus will issue as prayed.

Stone, C. J., Moore, and Brooke, JJ., concurred with McAlvay, J.

122 STATE OF MICHIGAN:

Supreme Court.

MICHIGAN RAILROAD COMMISSION, Relator,
v.
THE DETROIT & MACKINAC RAILWAY CO., Respondent.

Before Steere, C. J.; Moore, McAlvay, Brooke, Stone, Ostrander, JJ.

OSTRANDER, *J.*:

It is provided in section 22 (a) of Act 300, Public Acts of 1909, that an order of the railroad commission shall of its own force take effect and become operative twenty days after the service thereof. In section 47 of the act, it is provided that the commission may compel compliance "with the orders of the commission by proceedings in mandamus, injunction or by other appropriate civil remedies." Notwithstanding these provisions of the statute, whether a writ of mandamus shall be granted in a particular case is a judicial question and the fact that the railroad commission has made an order is not alone sufficient to require the court to issue the writ. The court may still inquire whether the writ ought to issue. The order of the commission which it is sought to compel the respondent to obey requires respondent to relay a portion of a spur line, to operate it and accept shipments over it offered by the Fletcher Paper Company, granting to said company the same facilities heretofore granted by it to the Churchill Lumber Company and
123 such other persons as have been granted rights of shipment over said spur. It is provided in the statute (section 22 (a)):

"Upon complaint in writing of any person, firm or corporation or association, or of any mercantile, agricultural or manufacturing society, or of any body politic or municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property or any service in connection therewith, is in any respect unreasonable or unjustly discriminatory, or that any service is inadequate, the commission shall notify the common carrier complained of that complaint has been made and shall furnish a copy of the said complaint with said notice, and twenty days after such notice has been given the commission may proceed to investigate the same as hereinafter provided. Before proceeding to make the investigation, the commission shall give the said common carrier and the complainants at least ten days' notice of the time and place when and where such matters will be considered and determined, and said parties shall be entitled to be heard and shall have process to enforce the attendance of witnesses. Such hearings may be continued from time to time in the discretion of the commission. If, upon such investigation, the rate or rates, joint rate or rates, fares, charges or classifications, regulation, prac-

tice or service complained of shall be found to be unreasonable, inadequate or unjustly discriminatory, the commission shall have power to and it shall determine and by order fix and order substituted therefor, such rate or rates, joint rate or rates, fares and charges, as is or are just and reasonable, and which shall be the maximum to be charged in the future, and such classifications, regulation, practice or service as is or are just, reasonable and adequate, and which shall be imposed and followed or service rendered in future in lieu of that found to be unreasonable, inadequate or unjustly discriminatory, and in either case the commission shall make an order that the common carrier cease and desist from such violation, and shall conform to the regulation and practice so prescribed."

We have not before us the complaint made to the railroad commission by the Fletcher Paper Company, but from the opinion delivered by the commission, which is set out in the opinion of my brother McAlvay, the facts involved may be understood. It is made evident by that opinion that the railroad commission considered that its powers under the act extend so far as to correct a rule or practice of the railroad company resulting in unjust discrimination and that it determined that the conduct of respondent in discontinuing business over the particular spur was a practice
124 resulting in unjust discrimination. It is further made evident that in determining that the Fletcher Paper Company was denied facilities afforded other shippers comparison was made, not between facilities afforded that company and other shippers situated on the particular spur, but between facilities afforded that company and those afforded shippers on other spur tracks which the respondent continued to operate. As the opinion is understood, it denies to respondent the right, under the circumstances disclosed, to discontinue operations over and to abandon the spur, or branch. And this right is denied, apparently, because, having constructed the spur, under the circumstances stated, and having in times past accepted freight thereon for transportation from persons other than the one with whom the original agreement to construct and operate the line was made, and because it operates other spurs or branches, it may not withdraw from the enterprise so long as its services are desired by any person, or so long, at least, as some person offers a fair amount of freight for shipment. So long as the respondent was operating the spur, accepting thereon and transporting over it freight for those who offered it, and so long as it published tariffs affecting such service, it was undoubtedly, as to such operations, within the scope of the act in question, and this we held in Detroit & Mackinac Ry. Co. v. Mich. R. R. Com., 171 Mich. 335. But whether the Michigan Railroad Commission has power under the statute to require respondent to continue to operate such a spur, or branch, against its will, and in face of its efforts to abandon it, is quite a different question. It is a question which we assume is presented in the pending chancery proceeding to set aside the order which in this proceeding is sought to be enforced. It need not be answered now. But if it is very doubtful, as I think it is,
125 whether the order, in its entirety, is one which the railroad commission had the authority to make, the doubt may be

and should be taken into account in determining whether the writ of mandamus should be granted to enforce the order.

It sufficiently appears that the attempted abandonment of the spur and its operation was without notice to the Fletcher Paper Company and that company had delivered, in the usual manner and in the only manner that forest products of like nature could be delivered for shipment, a considerable quantity of logs for transportation by respondent. If other goods of like value had been delivered and received by the respondent for shipment, it would be the duty of the respondent, I think, to transport them before abandoning the spur. As to such goods and the shippers, the relation of the respondent would be that of a common carrier of goods. While this relation continued, it would be subject to the provisions of the act. The rule ought to be the same with respect to such logs as had been delivered on the line of the road in the customary manner. They had not been received and receipted for by respondent as ordinarily freight tendered for shipment is received and receipted for by a railroad company, but according to usage they had been delivered along the line of the road for transportation and had been theretofore, upon such delivery transported. Whether it had or did not have greater power in the premises, I am satisfied that the Michigan Railroad Commission had power to order respondent to continue and complete the transportation of such logs, and to that extent compliance with the order which was made should be compelled by the writ of mandamus. The order of this court should be so limited.

126 With respect to other points presented for decision, I concur in what has been said by Mr. Justice McAlvay.

Stone, J., concurred with Ostrander, J.

127 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room in the Capitol, in the City of Lansing, on the Twentieth Day of December, in the Year of Our Lord One Thousand Nine Hundred and Thirteen.

Present, the Honorable Joseph H. Steere, Chief Justice; Joseph B. Moore, Aaron V. McAlvay, Flavius L. Brooke, John W. Stone, Russell C. Ostrander, Associate Justices.

No. 25373.

THE MICHIGAN RAILROAD COMMISSION, Relator,
vs.
THE DETROIT & MACKINAC RAILWAY COMPANY, Respondent.

This matter having been heretofore heard upon the petition of relator, the answer of respondent, and the briefs and arguments of counsel for the respective parties, and due consideration thereof having been had by the Court, and no sufficient cause being shown to the contrary; Thereupon it is Ordered that upon furnishing a

bond by the petitioner, the Fletcher Paper Company, before the Michigan Railroad Commission, relator herein, in the penal sum of Ten Thousand Dollars to indemnify respondent railway company in manner and form as provided in the opinion of the Court this day filed herein, with two sureties to be agreed upon between the parties, or approved by the Clerk of this Court, a peremptory Writ of Mandamus will issue out of and under the seal of this Court to compel it, the said Detroit and Mackinac Railway Company to make effective the order made by the Michigan Railroad Commission, dated August 3, 1911, and to put in force the said order to re-lay the rails on the Tubbs Branch and to accept shipments offered to it on said branch by the Fletcher Paper Company and to grant to the said Fletcher Paper Company the same facilities heretofore granted by the said Detroit and Mackinac Railway Company to the Churchill Lumber Company, and to the Fletcher Paper Company, successor to the Churchill Lumber Company and to such other persons, firms, corporations as have made shipments over said Tubbs Branch, sometimes called Martindale Spur.

128 *Bond Filed in Accordance with Order of Supreme Court of Michigan, Dated December 20th*, 1913.

Know All Men by These Presents, that we, Fletcher Paper Company, a Michigan Corporation, principal, and Allan M. Fletcher and Ralph E. Gilchrist, of the city and county of Alpena, State of Michigan, as sureties, are held and firmly bound unto the Detroit & Mackinac Railway Company, in the sum of Ten Thousand ($10,000) dollars, lawful money of the United States, to be paid to the said Detroit & Mackinac Railway Company, or its certain attorney or assigns; for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the Thirty-first day of December, in the year one thousand nine hundred and thirteen.

Whereas, the above bounden, Fletcher Paper Company, on the 19th day of January, A. D. 1911, filed with the Michigan Railroad Commission a complaint against said Detroit & Mackinac Railway Company, wherein among other things it was charged that on the 9th day of September, A. D. 1910, said Detroit & Mackinac Railway Company removed or caused to be removed part of the rails from the Tubbs' Branch or Martindale's Spur, so-called, and that said Detroit & Mackinac Railway Company had since that time refused to give service on said branch to the great loss and injury of the said Fletcher Paper Company;

And whereas, hearings were thereafter had before said Michigan Railroad Commission upon said complaint and said Michigan Railroad Commission on the 3rd day of August, A. D. 1911, by its order duly entered required the said Detroit & Mackinac Railway Company before the expiration of thirty days from the date of said order to re-lay the rails removed from the so-called Tubbs' Branch or Martindale's Spur and to accept the shipments offered to it on said

branch by the said Fletcher Paper Company, and to grant to the said Fletcher Paper Company the same facilities theretofore granted by said Detroit & Mackinac Railway Company to the Churchill Lumber Company:

And whereas, the said Detroit & Mackinac Railway Com-
129 pany before compliance with the said order of the Michigan Railroad Commission, and on September 2nd, 1911, filed its bill of complaint against the Michigan Railroad Commission in the Circuit Court for the County of Wayne, in Chancery, to review, vacate, and annul said order, which said cause is still pending in said court and undetermined;

And whereas, pending said proceedings in the Circuit Court for the County of Wayne, in Chancery, said Michigan Railroad Commission on or about the 9th day of August, 1912, applied by its petition to the Supreme Court of the State of Michigan, for a writ of mandamus to be issued against the Detroit & Mackinac Railway Company, requiring it to make effective the order made by the Michigan Railroad Commission dated August 3, A. D. 1911, by compelling the said Detroit & Mackinac Railway Company to put in force the said order to re-lay the said rails on the said Tubbs' Branch or Martindale's Spur, and to accept shipments offered to it on said branch by the Fletcher Paper Company and to grant to the said Fletcher Paper Company the same facilities heretofore granted by said Detroit & Mackinac Railway Company to the Churchill Lumber Company;

And whereas, in its said petition for the writ of mandamus and upon the hearing thereof in the Supreme Court, the Fletcher Paper Company has offered to furnish a bond to said Detroit & Mackinac Railway Company with satisfactory sureties in a sum equal to the cost of re-laying said rails, conditioned that it will pay all the cost of re-laying said rails, with interest from the date that the money may be expended;

And whereas, the said Supreme Court of the State of Michigan, by its decision and order of the 20th day of December, A. D. 1913, has granted the said petition of the Michigan Railroad Commission and ordered that the writ of mandamus therein prayed for should be granted upon furnishing bond by the petitioner before the Michigan Railroad Commission, the Fletcher Paper Company, in the penal sum of Ten Thousand dollars to indemnify the Detroit & Mackinac

Railway Company for all costs and expenses incurred in re-
130 laying the track taken up by it, with interest, and to pay all rates that may be fixed or charged by the said Railway Company, and approved by the Michigan Railroad Commission in case its order of August 3, A. D. 1911, is vacated and set aside by the Wayne Circuit Court, in Chancery, or by the Supreme Court of the State of Michigan, if an appeal is taken.

Now, therefore, the condition of this obligation is such that if the above bounden, Fletcher Paper Company, shall well and truly save, keep and bear harmless and indemnify the said Detroit & Mackinac Railway Company for all costs and expenses incurred in re-laying the track taken up by it on the Tubbs' Branch, or Martindale's Spur, with interest, in case said order of the Michigan Railroad Commis-

sion dated August 3, 1911, is vacated and set aside by the Wayne Circuit Court, in Chancery, in the said suit of Detroit & Mackinac Railway Company, complainant, vs. Michigan Railroad commission, defendant, or by the Supreme Court of State of Michigan, if an appeal is taken; and that said Fletcher Paper Company will pay all rates that may be fixed or charged by the Detroit & Mackinac Railway Company and approved by the Michigan Railroad Commission, for transporting the property of said Fletcher Paper Company offered to said Detroit & Mackinac Railway Company for transportation on said branch, then this obligation to be void, else to remain in full force and effect.

[SEAL.] FLETCHER PAPER CO., [L. S.]
By HENRY E. FLETCHER, [L. S.]
Secretary.
ALLAN M. FLETCHER. [L. S.]
RALPH E. GILCHRIST. [L. S.]

Sealed and delivered in presence of:
WOOLSEY W. HUNT.
W. C. PENNIMAN.

I hereby approve the foregoing bond and the sureties thereon.

CHAS. C. HOPKINS,
Clerk Supreme Court.

Jan. 8/1914.

131 STATE OF MICHIGAN,
County of Alpena, ss:

Allan M. Fletcher and Ralph E. Gilchrist, of the city of Alpena, in said County of Alpena, sureties of the principal named in the within and foregoing bond, each being duly sworn severally deposes and says that he is worth in unencumbered property not exempt from execution under the laws of this State, the sum of Ten Thousand dollars, after the payment of all just debts, claims and liabilities.

ALLAN M. FLETCHER.
RALPH E. GILCHRIST.

Subscribed and sworn to before me this 31st day of December, 1913.

WOOLSEY W. HUNT,
Notary Public.

My Commission expires Nov. 7, 1915.

132 Supreme Court of the United States, October Term, 1913.

DETROIT AND MACKINAC RAILWAY COMPANY, Plaintiff in Error,
vs.
MICHIGAN RAILROAD COMMISSION and FLETCHER PAPER COMPANY, Defendants in Error.

Error to Supreme Court of Michigan.

Petition for Allowance of Writ of Error.

To Hon. Wm. R. Day, Associate Justice, Supreme Court of the United States:

Your petitioner, the Detroit and Mackinac Railway Company respectfully applies for the allowance of a writ of error to review the judgment and order of the Supreme Court of Michigan, granted on the 20th day of December, 1913, in a case lately pending in said court wherein the Michigan Railroad Commission is the relator and the Detroit and Mackinac Railway Company is the respondent awarding a peremptory writ of mandamus to compel it, the Detroit and Mackinac Railway Company to make effective and put in force an order of the Michigan Railroad Commission dated August 3rd, 1911, requiring it to relay the rails on the Tubbs Branch and to accept shipments offered to it on the said Branch by the Fletcher Paper Company, and to grant to the said Fletcher Paper Company the same facilities heretofore granted by it to the Churchill Lumber Company and to the Fletcher Paper Company, successors to the Churchill Lumber Company, and to such other persons, firms, corporations as have made shipments over the Tubbs Branch, sometimes called Martindale Spur.

133 Your petitioner herewith submits a duly certified copy of the record in said cause, of the opinion of the court, and of the judgment and order of the court.

Your petitioner further shows:

I.

1. That on the 18th day of January, 1911, the Fletcher Paper Company presented to the Michigan Railroad Commission a petition, a copy of which appears in the certified record at pp. 8-10.

2. That the Detroit and Mackinac Railway Company filed an answer to said petition, a copy of which answer is in the certified record at pp. 30-38.

3. That a partial hearing on said petition of the Fletcher Paper Company and the answer thereto of the Detroit and Mackinac Railway Company, was had before the Michigan Railroad Commission on the 24th day of March, 1911; that Frank W. Fletcher, W. H. LeRoy, G. E. Martindale and Frank Cogswell were sworn and examined as witnesses for the Fletcher Paper Company, and James McNamara, general Counsel for the Detroit and Mackinac

Railway Company, was sworn in its behalf (certified record, pp. 55, 59, 72, 80); that Mr. McNamara produced and put in evidence a certified copy of the record in a case in the Circuit Court for the County of Alpena in chancery in a cause wherein the Fletcher Paper Company was complainant and the Detroit and Mackinac Railway Company was defendant; that Mr. McNamara also testified to the proceedings on the trial and final hearing of said cause, showing that all the questions of fact and law involved in the proceedings before the Michigan Railroad Commission were actually litigated, determined and adjudicated in said cause.

The certified record contains the following papers from
134 the files and records of said cause in the Alpena Circuit:

Sept. 10, 1910—Bill of complaint of the Fletcher Paper Company—certified record..... p. 39
Oct. 11, 1910—Answer of Detroit and Mackinac Railway Company—certified record ..... p. 43
March 20, 1911—Opinion of Hon. Frank Emerick, Judge of Alpena Circuit—certified record.... p. 105

4. That at said hearing, before the Michigan Railroad Commission, March 24th, 1911, the Detroit and Mackinac Railway Company, by its attorney and counsel after having introduced in evidence a certified copy of the record in the case in the Alpena Circuit, claimed that the decision of the court in that case was res adjudicata, and a bar to any proceedings before the Michigan Railroad Commission, and that question was submitted to the Commission with the distinct understanding that if the Commission came to the conclusion, that the decision of the court was not a bar, the Commission would notify Mr. McNamara and give the Detroit and Mackinac Railway Company an opportunity to be heard and to make a showing on the facts of the case.

On April 4, 1911, Mr. McNamara for the Company wrote to the Railroad Commission calling attention to said understanding and agreement, and on April 7th, 1911, the Commission by Mr. C. L. Glasgow, its Chairman, mailed a letter to Mr. McNamara, in which the understanding and agreement was fully confirmed, and it was distinctly stated:

"When the Commission comes to review the case, if in their judgment they feel that they have jurisdiction, and desire to pass on the facts presented, you will be notified, and if it is your desire a further hearing will be granted, for the purpose of allowing
135 you to make such showing." Certified record, p. 101.

5. In violation of said agreement, the Michigan Railroad Commission granted its order of August 3rd, 1911, without notifying the Detroit and Mackinac Railway Company or its counsel, and without giving them any opportunity to produce evidence to disprove the allegations of the Fletcher Company and to sustain the answer of the said railroad Company.

6. That the facts alleged in the foregoing paragraphs were duly set up, and alleged in the answer of the Detroit and Mackinac Railway Company to the petition of the Fletcher Paper Company for

a writ of mandamus to enforce the order of August 3, 1911; and which answer distinctly claims the protection of the due process of law and equal protection of the laws clauses of the Fourteenth Amendment of the Constitution of the United States. Certified record, pp. 22, 23, 27, paragraph 12.

II.

7. The answer of the Detroit and Mackinac Railway Company before the Michigan Railroad Commission to the petition of the Fletcher Paper Company shows that the Tubbs Branch, referred to in the petition was a mere private spur, which was constructed by the Churchill Lumber Company for its own use under a written contract between it and the Detroit and Mackinac Railway Company, under which contract the Churchill Lumber Company secured and owned the right of way, did the grading and furnished the ties,
and the railroad company furnished and laid the rails and
136 did what ballasting was necessary for a private logging tramway; that on the 8th day of June, 1910, the Churchill Lumber Company notified the railroad Company that it was all through removing timber on the Tubbs Branch and requesting the railroad company to remove its rails therefrom, and in pursuance of this notice the railroad company did on September 9, 1910, take up a part of said rails; that being informed that the Churchill Lumber Company had sold all its rights in the branch to the Fletcher Paper Company, Mr. J. D. Hawks, the Vice-President and General Manager of the Detroit and Mackinac Railway Company notified the Fletcher Paper Company by letter that if the track was to be rebuilt and the branch remain it would be necessary to come to some understanding about it. Certified record pp. 32-36.

The answer states these facts and makes the distinct claim that the Tubbs Branch was never anything but a private spur; that to compel the railroad company to rebuild it, would be to take private property for private use in violation of the due process of law clause of the Fourteenth Amendment. Certified record, pp. 37, 38.

As to the nature of the Tubbs Branch, what it cost, and how it was used, see the 16th paragraph of the answer of the railway company in the Supreme Court, pp. 27-28.

III.

8. The answer of the Detroit and Mackinac Railway Company to the petition for a writ of mandamus shows, record, pp. 27-28, that
the Tubbs Branch was built under a contract with the
137 Churchill Lumber Company, which contract fixed the rate for hauling logs from the Tubbs Branch to Alpena at $3.25 per thousand, and if the Fletcher Paper Company acquired all the rights of the Churchill Lumber Company in and to said Tubbs Branch, it did so subject to that contract; yet, while the order limits the future use of the branch to the Fletcher Paper Company as the successor of the Churchill Lumber Company and to others who

have made shipments over it, the condition of the bond of indemnity the Fletcher Paper Company is permitted to give only requires the Fletcher Paper Company to pay such rates as may be charged by the railway company and approved by the Commission, thereby treating the branch as a public railway and subject to the power of the Commission to fix rates.

The answer to the petition for a writ of mandamus specifically claims that if the property is regarded as taken for the public use, then the same would be taken and condemned without compensation, contrary to the due process of law clause of the Fourteenth Amendment of the Constitution of the United States, certified record, p. 38.

Impairing a contract right is a deprivation of property.

IV.

9. The act establishing the Michigan Railroad Commission expressly provides that any carrier conceiving itself aggrieved by an order of the commission may within thirty days from notice of the order file a bill in Chancery in the Circuit Court of the County having jurisdiction of the parties, to have it determined whether the order is not unreasonable and unlawful.

That in pursuance of this statute, and not otherwise the
138 Detroit and Mackinac Railway Company did on the 2nd day of September, 1911, file a bill in the Circuit Court for the county of Wayne, praying that the order of the Commission of August 3, 1911, might be declared null and void. Certified record, pp. 96-104.

That the Railroad Commission filed an answer to said bill, and thereupon the case being at issue, it was referred to an Examiner to take the proofs and said cause is still pending and undisposed of. Certified record, p. 26.

The bill sets up the facts showing the private nature of the Tubbs Branch, the want of any opportunity to be heard before the Railroad Commission, and it contains this paragraph:

"Your orator has been advised and respectfully submits that if the said act (the railroad commission act) is construed so as to apply to private logging branches like the Tubbs Branch, and to authorize the Michigan Railroad Commission to exercise jurisdiction over the same, then the said act and the proceedings of said commission thereunder is in conflict with the due process of law and the equal protection of the laws clauses of the Fourteenth Amendment of the Constitution of the United States." Certified record, p. 103.

10. All the foregoing federal questions arising under the Constitution of the United States were distinctly raised and specifically stated in the record on which the State Supreme Court disposed of the case, and the decision made necessarily decided all of them adversely to the federal rights claimed by the Detroit and Mackinac Railway Company.

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V.

11. There are other rulings and action- on the part of the Supreme Court of Michigan which could not be anticipated by counsel for the

railroad company, and be specifically stated on the record, but which are also violative of the guarantees of the Fourteenth Amendment.

The act creating the Michigan Railroad Commission provides that "its orders shall be prima facie evidence of their reasonableness and lawfulness, and if attacked, the complaining party has the burden of showing by clear and satisfactory evidence that the order of the Commission complained of is unlawful, or unreasonable, as the case may be." See opinion of the Supreme Court of Michigan, p. 11.

But that provision of the statute can not apply where the order of the Commission amounts to a taking of private property for the public use. In such cases the burden is on the Commission to show a public use. No state by its railroad commission or courts, has a right to take a person's property for the public use, and impose on him, if he does not like the taking, the burden of showing that his property was not taken for a public use.

This doctrine was expressly held by the Supreme Court of the United States in Oregon, etc., R. Co., vs. Fairchild, 224 U. S. 5-10.

Again: The act creating the Michigan Railroad Commission, expressly provides how a private plant or industry may get a spur: it must not be over two miles long; the private party must secure the right of way, and deed it to the Railroad Company; he must pay to the Railroad Company before the railroad company is required to do anything, the estimated expense the railroad company will be put to in building the spur track; and it must appear that the spur is indispensable to the successful operation of the plant or industry of the private party.

Nothing of that kind has taken place in this case, and the spur the Detroit and Mackinac Railway is ordered to rehabilitate is five and a half miles long.

VI.

12. In an attempt to overcome all of the insuperable obstacles to an enforcement of the order of August 3rd, 1911, before the final determination of the suit pending in the Wayne Circuit, the Supreme Court of Michigan has further violated the fundamental guarantees of the Fourteenth Amendment. The writ of mandamus is not to issue, unless the Fletcher Paper Company (which is not a party to the petition for a mandamus), files a bond in the penal sum of $10,000 to indemnify the railway company from all costs and expenses incurred in relaying the track taken up by it, with interest, and to pay all rates that may be fixed or charged by the railway company and approved by the Commission, in case the order is vacated and set aside by the Wayne Circuit in Chancery or by the Supreme Court, if an appeal is taken. See opinion of the court, p. 12, and the order and judgment of the court.

In this case, there has never been after a full and free hearing and inquiry, a determination of the question, whether the Tubbs Branch is a public or a private spur; except in the case in the Alpena Circuit, where it was found that it was a private spur. Notwithstanding this condition of the litigation, it is proposed on the strength of a mere private bond with an objectionable condition, to execute the order of the Railroad Commission of August 3, 1911.

143 If there is any one thing clear about the meaning of the words "due process of the law" it is that a hearing and judgment must precede execution. The law hears and confirms before it executes.

Bonds in cases like this may be required to preserve the *status quo* until a final adjudication, but not to disturb it by giving the plaintiff all the relief he asks.

11. As bearing upon the question whether there is any public necessity for the construction of the Pabst Branch, it is claimed in the answer to the petition for a mandamus, that "the timber now claimed to be owned by the Fletcher Paper Company can transported by and the timber thereon is tributary to the Ontonagon and Northern Michigan Railroad, which connects with the respondent's line at Ontonagon." etc. Certified record, p. 29.

That your petitioner has been informed and believes and charges the fact to be that the hardwood timber and the land on the hemlock trees are the property of the Kobbé and Churchill Company located at Ontonagon and which Company owns and controls the Ontonagon and Northern Michigan Railroad, and that the Fletcher Paper Company only owns the hemlock logs after the bark has been stripped from them, showing that the one railroad is all that is needed for both interests.

Wherefore your petitioner prays that a writ of error may be allowed and a supersedeas bond be approved according to the statute and the practice of the court.

Your petitioner herewith submits an instrument of error to be filed with the writ of error in the court below.

DETROIT AND MACKINAC RAILWAY COMPANY.

By FRED V. BAKER, *Its Agent and Attorney.*

JAMES McNAMARA,
FRED V. BAKER,
Attorneys for Petitioner and Plaintiff in Error.

142 DISTRICT OF COLUMBIA, ss.

On the 30th day of December, 1911, before me, a Notary Public in and for said District, personally appeared Fred V. Baker, who subscribed the above and foregoing petition and made oath that he had authority to sign said petition for and on behalf of the Detroit and Mackinac Railway Company, that he knows the contents of said petition, and the same is true of his own knowledge, except the matters and things therein stated on information and belief, and as to those matters he believes them to be true.

[Seal] Pearl V. Phelps, Notary Public, District of Columbia.

PEARL V. PHELPS,
Notary Public, D. C.

My commission expires Nov. 17, 1913.

[Endorsed:] No. 643. Supreme Court of the United States, October Term, 1911. Detroit & Mackinac Ry. Co., Plaintiff in Error, vs. Michigan Rd. Commission and Fletcher Paper Company, Defend-

ants in Error. Petition for allowance of writ of error. James McNamara, Fred L. Baker, Attorneys for Plaintiff in Error.

[1] UNITED STATES OF AMERICA, ss:

To Michigan Railroad Commission and Fletcher Paper Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of Michigan, wherein Detroit & Mackinac Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William R. Day, Associate Justice of the Supreme Court of the United States, this thirty-first day of December, in the year of our Lord one thousand nine hundred and fourteen.

WILLIAM R. DAY,
Associate Justice of the Supreme Court
of the United States.

STATE OF MICHIGAN,
County of Wayne, ss:

On this 6th day of January, in the year of our Lord one thousand nine hundred and fourteen, personally appeared Fred L. Baker before me, the subscriber, a Notary Public in and for said county and state, who being by me delivered a true copy of the within citation to Grant Fellows, the Attorney General of Michigan and Attorney of Record in the court below of the defendant in error in the 5th day of January, 1914, and on the 6th day of January, 1914 he mailed a copy of said citation to Cutler & Cutler at Bay City, Mich., they having represented the Fletcher Paper Co. in the court below.

FRED L. BAKER.

Sworn to and subscribed this 6th day of January A. D. 1914.

OLIVE THURBER,
Notary Public, Wayne Co., Mich.

My commission expires Sept. 29-15.

[Endorsed:] Supreme Court United States. Detroit & Mackinac Railway Co., Plaintiff in Error, v. Michigan Railroad Commission and Fletcher Paper Co., Defendants in Error. Citation and Proof of Service. Filed Jan. 7, 1914. Chas. C. Hopkins, Clerk. James McNamara, Fred L. Baker, Attorneys for Plaintiff in Error.

144 Copy.

Know all Men by these Presents, That we, The Detroit & Mackinac Railway Co*m*a*p*ny, a Michigan Railroad Corporation, as principal, and The American Surety Company of New York, as sureties, are held and firmly bound unto The Michigan Railroad Commission and the The Fletcher Paper Company in the full and just sum of Twenty Thousand ($20,000.00) dollars, to be paid to the said Michigan Railroad Commission and The Fletcher Paper Company, or their certain attorneys, successors executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 31st day of December, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a Session of the Supreme Court of the State of Michigan in a suit depending in said Court, between The Michigan Railroad Commission, Relator, and the Detroit & Mackinac Railway Company, Respondent a Judgment was rendered against the said Detroit & Mackinac Railway Company and the said Detroit & Mackinac Railway Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Michigan Railroad Commission and The Fletcher Paper Company citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Detroit & Mackinac Railway Company shall prosecute said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

DETROIT & MACKINAC RAILWAY CO.
J. D. HAWKS, [SEAL.]
Vice-Pres't & Gen'l M'g'r.
AMERICAN SURETY CO. OF NEW YORK, [SEAL.]
By —— NYE, *Resident Vice-President.* [SEAL.]

Attest:
PAUL N. CHERRY,
Resident Assistant Secretary. [SEAL.]

Sealed and delivered in presence of—
—— ——.
—— ——.

Approved by—
WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

5 Supreme Court of the United States, October Term, 1913.

ETROIT AND MACKINAC RAILWAY COMPANY, Plaintiff in Error,
vs.
ICHIGAN RAILROAD COMMISSION and FLETCHER PAPER COMPANY,
Defendants in Error.

Error to the Supreme Court of Michigan.

Assignment of Errors.

The Detroit and Mackinac Railway Company, Plaintiff in Error, d the respondent below, by James McNamara and Fred A. Baker, Attorneys, says that there is manifest error in the record, and oceedings aforesaid, and in the order and judgment awarding a remptory writ of mandamus against the Detroit and Mackinac ilway Company in this, to wit: that the opinion, rulings and cisions of the court are contrary to and in violation of the pro-ions of the Fourteenth Amendment of the Constitution of the ited States, that no state shall deprive any person of life, liberty, property, without due process of law; nor deny to any person thin its jurisdiction the equal protection of the laws; and in the lowing particulars:

1. The court erred in awarding the said writ of mandamus with-t giving the Detroit and Mackinac Railway Company an oppor-nity to be heard and to make a showing with proofs and evidence disprove the allegations of the petition for a mandamus and to tain the allegations of the answer to said petition.

2. The court erred in ruling that the writ of mandamus could issue before the case pending in the Circuit Court of the 5 County of Wayne between the same parties was finally de-termined and adjudicated.

3. The court erred in ruling that the Detroit and Mackinac Rail-y Company had had an opportunity to be heard on the facts of case and to submit proofs before the Michigan Railroad Com-ssion.

4. The court erred in ruling that on the question whether the der of the Michigan Railroad Commission was unreasonable or lawful, the burden of proof was on the Detroit and Mackinac Rail-y Company.

5. The court erred in refusing to rule that on the facts alleged in answer of the Detroit and Mackinac Railway Company to the ition of the Fletcher Paper Company, and in its bill of complaint the Circuit Court for the County of Wayne, and its answer to petition for a writ of mandamus, the Tubbs Branch is of a private ure and not a part of the statutory and public railroad of the troit and Mackinac Railway Company, and as such, not subject the jurisdiction of the Michigan Railroad Commission.

6. The court erred in ruling that the pleadings in the case before court, and the pleadings and testimony before the Railroad Com-

mission were all that the court need consider in disposing of the petition for a mandamus, and in refusing to consider the bill of complaint in the Wayne Circuit and the other facts and records in the case.

7. The court erred in directing the issue of a peremptory writ of mandamus whenever the Fletcher Paper Company filed a bond to indemnify the respondent with the condition prescribed by the opinion of the court.

8. The Detroit and Mackinac Railway Company has not been given at any stage of the proceedings an opportunity to be
147 heard and to submit proofs on questions of fact which must be determined adversely to it before writ of mandamus can issue compelling it to rehabilitate the Tubbs Branch and to serve the Fletcher Paper Company thereon.

9. The judgment and order of the Supreme Court of Michigan is in other respects a violation of the guarantees of the Fourteenth Amendment of the Constitution of the United States.

Wherefore the plaintiff in error prays that the judgment and order of the Supreme Court of Michigan of the 20th day of December, 1913, may be reversed, etc.

JAMES McNAMARA,
FRED A. BAKER,
Attorneys for Plaintiff in Error.

December 30th, 1913.

148 [Endorsed:] Orig. Supreme Court of the United States, October Term, 1913. Detroit & Mackinac Ry. Co., Plaintiff in Error, vs. Michigan Rd. Commission and Fletcher Paper Company, Defendants in Error. Assignment of Errors. James McNamara, Fred A. Baker, Attorneys for Plaintiff in Error.

149 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Detroit & Mackinac Railway Company, plaintiff in error, and Michigan Railroad Commission and Fletcher Paper Company, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in

150 question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Detroit & Mackinac Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirty-first day of December, in the year of our Lord one thousand nine hundred and thirteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by

WILLIAM R. DAY,
Associate Justice of the
Supreme Court of the United States.

151 Supreme Court of the State of Michigan.

DETROIT AND MACKINAC RAILWAY COMPANY, Plaintiff in Error,
v.
MICHIGAN RAILROAD COMMISSION and FLETCHER PAPER COMPANY,
Defendants in Error.

IN THE SUPREME COURT, *ss:*

I, Charles C. Hopkins, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true copy of the record, and of all proceedings had and determined in the above entitled cause by said Supreme Court, including the original decision and reasons therefor, signed by the Judges of said Court, and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original and it is a true transcript therefrom and of the whole thereof; that attached thereto are the petition for the Writ of Error, the Writ of Error with allowance endorsed thereon; the Citation with proof of service endorsed thereon, a copy of the bond duly approved, together

with the assignments of error, as signed by attorneys for the plaintiff in error.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at the City of Lansing, this thirty-first day of January, in the year of our Lord, one thousand nine hundred and fourteen.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk of the Supreme Court of Michigan.

Endorsed on cover: File No. 24,053. Michigan Supreme Court. Term No. 360. Detroit & Mackinac Railway Company, plaintiff in error, vs. Michigan Railroad Commission and Fletcher Paper Company. Filed February 10th, 1914. File No. 24,053.

2

FEB 23 1915
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 360 68

DETROIT AND MACKINAC RAILWAY COMPANY,
Plaintiff in Error.

vs.

MICHIGAN RAILROAD COMMISSION AND FLETCHER PAPER COMPANY,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES MCNAMARA,
FRED A. BAKER,
Counsel for Plaintiff in Error.

DETROIT:
Record Printing Co., Free Press Bldg., 11-17 Lafayette Boulevard.
1915

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CHRONOLOGICAL.

1906.

Churchill Lumber Co., acquires right of way, does the grading and furnishes the ties, and the Detroit & Mackinac Railway Co., furnishes and lays the rail on the Tubbs Branch.

1909.

Feb. 16.—Detroit & Mackinac Railway Co., files and publishes its Tariff, M. R. C. 210, G. F. D. 564, to be effective Feb. 28, 1909, on logs to Onaway.

Dec. 21.—Detroit and Mackinac Railway Co. files and publishes its tariff, M. R. C. 277, G. F. D. 669, to be effective Jan. 2, 1910, on logs to Alpena.

Dec. 22.—Detroit & Mackinac Railway Co., files and publishes its Tariff M. R. C. 278, G. F. D. 670, to be effective Jan. 3, 1910, on hemlock bark, birch and pine bolts, excelsior bolts, and pulp wood.

1910.

May 7.—Detroit & Mackinac Railway Co., files and publishes its official station list and local distance table, M. R. C. 300, G. F. D. 565-A., to be effective intrastate May 19, 1910, interstate June 11, 1910.

June 8.—Churchill Lumber Co., requests the railroad company to remove the rails on the Tubbs Branch.

July 21.—Detroit & Mackinac Railway Co., files and publishes its Supplement No. 2 to M. R. C. 300, G. F. D. 565-A., eliminating the Tubbs Branch.

Aug. 3.—Fletcher Paper Company buys the Tubbs Branch from the Churchill Lumber Co.

Aug. 9.—Churchill Lumber Company withdraws its request for the removal of the rails on the Tubbs Branch.

Sept. 9.—Detroit & Mackinac Railway Co., disconnects the Tubbs Branch from the main line by removing half a mile of rail.

Sept. 10.—Fletcher Paper Company files bill in Alpena Circuit Court in Chancery for an injunction restraining the railroad company from taking up the rail, and enjoining it to continue service on the Branch for the Fletcher Paper Company.

Sept. 12.—Detroit & Mackinac Railway Company offers to restore the branch and resume service thereon on terms to be agreed upon.

Oct. 6.—Detroit & Mackinac Railway Co., files and publishes official station list and local distance table, M. R. C. 321, G. F. D. 565-B., continuing the elimination of the Tubbs Branch.

Oct. 11.—Detroit & Mackinac Railway Co., files its answer to bill in the Alpena Circuit.

Nov. 22.—Case in Alpena Circuit tried before Hon. Frank Emerick, Circuit Judge, in open court and cause submitted to the court.

1911.

Jan. 11.—Fletcher Paper Company files complaint before Michigan Railroad Commission.
Answer of Railroad Company filed.

Mar. 20—Opinion of Judge Emerick in the Alpena Circuit filed.

Mar. 24.—Partial hearing before Michigan Railroad Commission.

May 12.—Detroit & Mackinac Railway Co., files and publishes its Tariff, M. R. C. 342, G. F. D. 644-A., continuing the elimination of the Tubbs Branch.

Aug. 3.—Michigan Railroad Commission grant order requiring restoration of Tubbs Branch.

Sept. 2.—Detroit & Mackinac Railway Co. files its bill in the Circuit Court for the County of Wayne in Chancery.

Michigan Railroad Commission filed an answer and the case being at issue, was referred to an examiner to take proofs. (It is still pending).

1912.

Aug. 9.—Michigan Railroad Commission files a petition in the Supreme Court of Michigan, for a writ of mandamus, compelling the restoration of the Tubbs Branch and the resumption of service thereon.

Detroit & Mackinac Railway Co. files an answer to the petition.

1913.

Jan. 14.—Case argued and submitted to Supreme Court of Michigan.

Dec. 20.—Opinion filed and mandamus granted.

Dec. 30.—Writ of Error allowed and supersedeas bond approved and filed.

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 360

DETROIT AND MACKINAC RAILWAY COMPANY,
Plaintiff in Error.

vs.

MICHIGAN RAILROAD COMMISSION AND FLETCHER PAPER COMPANY,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The Fletcher Paper Company, Jan. 18, 1911, filed a complaint (Record, p. 5) before the Michigan Railroad Commission, praying for an order requiring the Detroit and Mackinac Railway Company to resume service on the logging spur known as the Tubbs Branch, a part of which near the switch connecting with the main line had been taken up by the railroad company September 9, 1910.

THE COMPLAINT.

The complaint alleges that the Churchill Lumber Company provided the right of way for the Tubbs Branch, constructed the grade and placed ties thereon, for the distance of five miles; that the railroad company laid and owns the rail, and operated the branch by hauling logs over it for the Churchill Lumber Company, the Fletcher Paper Company and the Lobdell-Churchill Company, until September 8, 1910.

It is further alleged that the Fletcher Paper Company August 3, 1910, purchased from the Churchill Lumber Company, all its rights, title and interest in the right of way of the Tubbs Branch, and is the owner of the same; that the Fletcher Paper Company has 100,000 feet of logs banked and ready to ship, and 300,000 feet cut and ready to haul to the branch for shipment, and 21,250,000 feet tributary to the branch, of which 5,000,000 feet is dead timber which must be utilized within a short time or become a total loss; and that the Fletcher Paper Company desires to ship all this timber on the Tubbs Branch, and great harm and damages will result if it cannot do so; and it purchased the right of way expecting to make use of the branch.

It is further alleged that the Tubbs Branch appears in the published tariff on logs to Alpena of the railroad company known as M. R. C. 277; and it is claimed that the withdrawal of service on the Tubbs Branch is a violation of the act creating the Michigan Railroad Commission.

It will be observed that the complaint does not allege that the Fletcher Paper Company had requested the railroad company to relay the track taken up and to resume service on the branch, or had in any manner approached the railroad company on that subject.

The Answer.

The Detroit and Mackinac Railway Company filed an answer (*Record, p.* 19) to the complaint, the substance of which may be summarized as follows:

1. A prior suit pending, in the Circuit Court for the County of Alpena in Chancery, wherein the Fletcher Paper Co., alleges the same facts and prays for the same relief.

2. The Tubbs Branch was built on a right of way secured by the Churchill Lumber Company who did the grading and furnished the ties, and the railroad company furnished and laid the rails, and as an inducement the lumber company agreed to furnish for shipment a certain number of million feet of logs per year.

3. No preliminary steps were ever taken as conditions precedent to the establishment of a branch for the use of

the public, and said branch never became a part of the defendant's railroad system whereby it could enforce the perpetual use thereof for the public.

This has reference to statutory provisions requiring railroad companies to file maps of their routes and rights of way.

3 How. Mich. Stat. 2 ed. secs. 6585-6586.

4. The Tubbs Branch was used by the Churchill Lumber Company and the railroad company for the hauling of logs from 1906 until June 8, 1910, when the lumber company served written notice on the railroad company that it had got out all its logs and requesting the removal of the rails; and September 9th, 1910, the railroad company did remove 2,700 feet thereof.

5. The railroad company was not advised by the Fletcher Paper Company that it had acquired the Tubbs Branch from the Churchill Lumber Company until the branch had been disconnected with the main line and service thereon discontinued.

6. On the 10th day of September, 1910, the Fletcher Paper Company filed its bill in the Alpena Circuit claiming it had acquired the Tubbs Branch and praying for an injunction and a resumption of the service, and on the 12th day of September, 1910, the railroad company mailed a letter to the Fletcher Paper Company, which reads (*Record, p.* 22):

"Detroit, Mich., Sept. 12, 1910.

"Fletcher Paper Co., Alpena, Mich.

"Dear Sirs: I understand that you have bought from the Churchill Lumber Company of Alpena the right to the exclusive use and control of the land now used as a roadbed for what is known as the Tubbs Branch of the D. & M. R. R.

"Pending some settlement as to how this branch is to be used in the future, I have had part of the branch taken up. Is it your wish that the balance of the branch be taken up?

"If the branch is to remain, do you expect to deed the right of way to this company together with the right of other shippers to reach the track and to bank logs for forest products on the right of way and adjacent thereto?

"If we rebuild the track, how long would you ex-

pect it to stay down, and what rate would you expect to pay on logs to Alpena?

"If it is your intention to operate the Tubbs Branch yourself, would be pleased to rent you the rail now on the branch.

Yours truly,

J. D. HAWKS.

Vice-President and Gen'l. Mgr."

"To which letter said complainant has never made any reply and the same remains unanswered up to and including the present time."

The Hearing.

The hearing before the Michigan Railroad Commission took place March 24, 1911 (*Record, p.* 32).

The following facts appeared at the hearing:

1. The Tubbs Branch was built by and was owned by the Churchill Lumber Company, the railroad company only furnishing and laying the rails; that the Tubbs Branch was used by the Churchill Lumber Company until their timber was exhausted and they requested the rails to be taken up; that while the branch was being used by the Churchill Lumber Company it was also used by the Fletcher Paper Company and the Lobdell-Churchill Company of Onaway, and to some extent by the Emery-Martin Company of Cheboygan; and that the Churchill Lumber Company charged the other companies $1.50 a car or 50c a thousand feet for their use of the branch; but the Fletcher Paper Company had never paid anything; that the Churchill Lumber Company had rendered bills to the Lobdell-Churchill Company and in acquiring the branch from that company, the Fletcher Paper Company also acquired the right to collect the bills due from the Lobdell-Churchill Company, and all other rights past, present and future, for all which the Fletcher Paper Company paid to the Churchill Lumber Company $4,000.

2. That the transaction of purchasing the Tubbs Branch and prior rights of action was had without consulting the railroad company, and it was not taken into the transfer discussion at all; that the Fletcher Paper Company gave no notice of its purchase to the Detroit & Mackinac Railway Company and made no request; that after the Churchill Lumber Company had parted with its title to the branch (August

3, 1910) it withdrew its request to have the rails removed (August 9, 1910); and that the Fletcher Paper Company received the letter of the railroad company of September 12, 1910, above set forth and never made any reply thereto, or in any way approached the railroad company on the subject of further service on the Tubbs Branch.

3. Between the filing of the answer of the railroad company and the hearing before the Railroad Commission, the case in the Alpena Circuit of the Fletcher Paper Company against the Detroit & Mackinac Railway Company, was heard and determined. All the facts in regard to the Tubbs Branch were brought before the Court, and the Circuit Judge, Hon. Frank Emerick, held that the Tubbs Branch was a mere private convenience, resting in private contract. The bill of the Fletcher Company was dismissed (*Record*, pp. 62-64).

The bill of complaint and the answer of the railroad company are in the Record on pp. 24, 26.

A certified copy of the whole record in the Alpena Circuit was introduced (*Record*, p. 49).

The decree dismissed the bill of complaint "without prejudice to complainant to file its petition for relief with the Michigan Railroad Commission" (*Record*, p. 68).

4. The railroad company introduced no other evidence and relied upon the decision of the Alpena Circuit as conclusive and final, not having been appealed from, and that question "was submitted to the commission with the understanding and agreement on the part of the commission that in case they held that the proceedings in the Alpena Circuit Court in Chancery were not a bar, that this respondent should have an opportunity to introduce evidence in support of the answer which it had filed to the said complaint of the Fletcher Paper Company" (*Record*, pp. 14, 60).

This understanding and agreement was subsequently put in writing in correspondence between the counsel for the railroad company and the chairman of the commission (*Record*, p. 60).

5. The Lobdell-Churchill Company after the half mile of track was taken up and before the hearing, removed the logs they had banked on the Tubbs Branch and hauled them from two to four miles to the main line, and had expressed

the intention of extending their own railroad into the timber tract to take out their timber (*Record*, p. 38).

The Fletcher Paper Company can make use of the same railroad to have their logs hauled to Onaway and connecting there with the Detroit & Mackinac and thence to Alpena; but they do not wish to pay the switching charge of $5.00 a car or $1.67 per thousand feet, which the Lobdell-Churchill Company charges for the use of their railroad (*Record*, pp. 38 and 64).

Gardner and Peterman, mentioned in the testimony of W. H. Leroy (Record, p. 39, near top of page), are also of Onaway.

6. The Tubbs Branch was ordered restored for the use of the Fletcher Paper Company, and for no other person, firm or corporation whomsoever.

Subsequent Proceedings.

1. Notwithstanding said agreement the railroad commission, without any further notice or hearing, granted its order of August 3, 1911, requiring the railroad company within sixty days, "to relay the rails removed by it from the so-called Tubbs Branch or Martindale Spur and to accept shipments thereon offered to it on said branch by the complainant, the Fletcher Paper Company, and to grant to said Fletcher Paper Company the same facilities heretofore granted by the said Detroit & Mackinac Railway Company to the Churchill Lumber Company and to such other persons, firm or corporation as have been granted rights of shipment over said Tubbs Branch or Martindale Spur" (*Record*, pp. 60, 61, p. 7).

2. On the 2nd day of September, 1911, the Detroit & Mackinac Railway Company filed its bill in the Circuit Court for the County of Wayne in Chancery, setting up all the facts of the case, and praying that the order of the commission of August 3, 1911, might be decreed and declared null and void; and for temporary and perpetual injunctions (*Record*, pp. 16, 57-62).

The Railroad Commission and the Fletcher Paper Company answered the bill and the issues thereon are still pending in the Circuit Court for the County of Wayne (*Record*, p. 16).

3. August 9, 1912, the Michigan Railroad Commission filed a petition in the Supreme Court of the State for a writ of mandamus to compel the Detroit & Mackinac Railway Company to put the order of August 3, 1911, in force (*Record,* pp. 1-5).

The railroad company filed an answer again setting up the facts, and offering to prove the same, and praying that if its answer was not accepted as true, issues of fact might be framed and determined according to the rules and practice of the Court (*Record,* pp. 13-18).

4. Without giving the railroad company any opportunity to introduce proofs, the Supreme Court, in an opinion by Justice McAlvay granted the mandamus (*Record,* pp. 64-74, 77-78).

Justices Ostrander and Stone dissented in part (*Record,* pp. 75, 77).

The order is on the condition that the Fletcher Paper Company file an indemnity bond of $10,000; and it was filed (*Record,* p. 78).

5. A writ of error was allowed by Mr. Justice Day on the filing of a supersedeas bond of $20,000 (*Record,* p. 88).

Errors Assigned.

The errors assigned (*Record,* p. 89) are as follows:

That the opinion, rulings and decisions of the court are contrary to and in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, that no state shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws; and in the following particulars:

1. The court erred in awarding the said writ of mandamus without giving the Detroit & Mackinac Railway Company an opportunity to be heard and to make a showing with proofs and evidence to disprove the allegations of the petition for a mandamus and to sustain the allegations of the answer to said petition.

2. The court erred in ruling that the writ of mandamus could issue before the case pending in the Circuit Court of the County of Wayne between the same parties was finally determined and adjudicated.

3. The court erred in ruling that the Detroit & Mackinac Railway Company had had an opportunity to be heard on the facts of the case and to submit proofs before the Michigan Railroad Commission.

4. The court erred in ruling that on the question whether the order of the Michigan Railroad Commission was unreasonable or unlawful, the burden of proof was on the Detroit & Mackinac Railway Company.

5. The court erred in refusing to rule that on the facts alleged in the answer of the Detroit & Mackinac Railway Company to the petition of the Fletcher Paper Company, and in its bill of complaint in the Circuit Court for the County of Wayne, and its answer to the petition for a writ of mandamus, the Tubbs Branch is of a private nature and not a part of the statutory and public railroad of the Detroit & Mackinac Railway Company; and as such, not subject to the jurisdiction of the Michigan Railroad Commission.

6. The court erred in ruling that the pleadings in the case before the court, and the pleadings and testimony before the railroad commission were all that the court need consider in disposing of the petition for a mandamus, and in refusing to consider the bill of complaint in the Wayne Circuit and the other facts and records in the case.

7. The court erred in directing the issue of a peremptory writ of manadmus whenever the Fletcher Paper Company filed a bond to indemnify the respondent with the condition prescribed by the opinion of the court.

8. The Detroit & Mackinac Railway Company has not been given at any stage of the proceedings an opportunity to be heard and to submit proofs on questions of fact which must be determined adversely to it before the writ of mandamus can issue compelling it to rehabilitate the Tubbs Branch and to serve the Fletcher Paper Company thereon.

9. The judgment and order of the Supreme Court of Michigan is in other respects a violation of the guarantees of the Fourteenth Amendment of the Constitution of the United States.

FEDERAL QUESTIONS.

The Detroit & Mackinac Railway Company, in its answer to the complaint of the Fletcher Paper Company before the Michigan Railroad Commission (*Record, pp.* 19, 23), invoked the protection of the Constitution of the United States as follows:

> "This defendant, the Detroit & Mackinac Railway Company, moves to dismiss the bill of complaint of the Fletcher Paper Company, for the following additional reasons:
>
> 'First. To grant the relief prayed by said complainant would be to take the private property of the Detroit & Mackinac Railway Company, for the private use of the Fletcher Paper Company, contrary to the due process of law clause of the Fourteenth Amendment of the Constitution of the United States.
>
> 'Second. If the use to be made of the property to be taken by the writ or order prayed in this case is to be regarded as taken for a public use, then the same would be taken and condemned without compensation, contrary to the due process of law clause of the Fourteenth Amendment of the Constitution of the United States.
>
> 'Third. It appears by the pleadings that the logging branch of the Detroit & Mackinac Railway Company, known as the Tubbs Branch, is essentially private in its nature; that, as to it, the Detroit & Mackinac Railway Company is not a common carrier.'
>
> "That the construction and operation of these logging branches is not subject to regulation or control by any governmental authority, but depends upon such contracts, express or implied, oral or written, that have been or may hereafter be entered into between each lumberman or timber owner and the railway company."

In its bill of complaint, filed in the Circuit Court for the County of Wayne in Chancery (*Record, pp.* 57, 61) the Detroit & Mackinac Railway Company said:

> "Your orator has been advised, and respectfully

submits that if the said act is construed so as to apply to private logging branches like the Tubbs Branch, and to authorize the Michigan Railroad Commission to exercise jurisdiction over the same, then the said act and the proceedings of the said commission thereunder is in conflict with the due process of law and the equal protection of the law clauses of the Fourteenth Amendment of the Constitution of the United States."

In its answer to the petition for a mandamus (Record, pp. 13-18, the railroad company said:

"This respondent further shows that until proofs are taken in said cause and the case is heard and submitted to the Circuit Court for the County of Wayne in Chancery, it will have had no opportunity to introduce evidence and to be heard on the facts on which the order of the railroad commission is based, or to disprove the allegations of the complaint of the Fletcher Paper Company to the commission (Exhibit "A" of the petition of the relator), or to maintain and prove the allegations of its answer to said complaint (Exhibit "A" of this answer, pp. 19-15); that this respondent has been advised and respectfully submits that to grant the writ of mandamus prayed would be a violation of the due process of law and equal protection of the laws, clauses, of the Fourteenth Amendment of the Constitution of the United States.

This respondent is advised and submits that said order of the Michigan Railroad Commission of August 3, 1911, if enforced, would deprive this respondent of its property without due process of law, and deny to it the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States."

Statutory Provisions.

The act to regulate common carriers enacted by the Michigan Legislature in 1909, contained these provisions (*Michigan Public Acts* 1909, p. 708):

Sec. 3, Subd. C.

"The term 'railroad,' as used in this act, shall be construed to mean all railroads, whether operated by

steam, electricity or other motive power; Provided, that the provisions of this shall not apply to any logging or other private railroad not doing business as a common carrier," etc.

Sec. 14.

"The commission shall have control over private side tracks so far as the same are used by common carriers."

An amending act passed in 1911 (*Mich. Public Acts* 1911, page 210), which took effect April 25, 1911, made an addition to Sec. 14, which addition commences as follows:

"No change or discontinuance in the service from to or on such sidetracks, spurs or branches or abandonment or removal of said sidetracks, spurs or branches, except sidetracks or spurs solely required for the convenient operation of its engine and trains and *private industrial sidetracks*, shall be made except after ten days' notice to the commission," etc.

The whole act as amended can be found in 3 *How. Mich. Stat., 2d ed.*, pp. 2628-2664.

STATE COURT DECISION.

The Supreme Court of the State in *Detroit & Mackinac Railway Company vs. Michigan Railroad Commission*, 171 *Mich.*, 335, at p. 343, quoted the above statutory provisions and then said:

"The meaning of the proviso, 'That the provisions of this act shall not apply to any logging or other private railroad not doing business as a common carrier' is not entirely clear. Much may be said in favor of the proposition that any railroad ought to be permitted to build or operate temporarily, and by private arrangements, a branch line for the convenience of a patron, without subjecting its agreement or its performance thereof to public supervision. Contrariwise, it is apparent that a railroad might in this way greatly prefer an individual, or company, over others similarly situated. The language of the proviso does not suggest the meaning that common carrier railroads are excepted from the jurisdiction of the commission with

respect to operations upon and over temporary branch lines, whether logging operations or others. On the contrary, apt language is used to express the idea that private railroads alone are excepted, and not those if they do business as a common carrier. Complainant is not a private railroad. It does business as a common carrier. Its branch lines have been laid and operated for the convenience of timber owners, it is true, but for the convenience of all of them whose timber was so conveniently reached by the branch. Branches have been extended, new branches have been run from those first laid, and the purpose has been to reach with each branch such timber as was offered for transportation. It has published tariffs giving rates to the ends of branches, and has filed them with the commission. With a single exception, and that does not apply to an Alpena log owner, it does not appear that its rates for transporting timber from any of its branches are contract rates.

What its duties and liabilities in the operation of its branches are or would have been at common law is not very material. We have no doubt of the power of the Legislature to require it to submit those operations to State supervision. The question is whether it has done so, and this question, we think, must be answered in the affirmative."

Prior to the enactment of the statutory provisions and the delivery of the decision, above quoted, it was settled law in Michigan that a sidetrack or spur for a single industrial plant was a private convenience, and a right of way therefor could not be acquired by proceedings to condemn it to the public use.

Mann vs. Pere Marquette R. Co., 135 *Mich.,* 210.
Pere Marquette R. Co. vs. Gypsum Co., 154 *Mich.,* 290.

In the first of these cases, decided in 1903, the Court said:

"In contracting to put in these sidetracks the defendant was not acting in the capacity of a common carrier. It was under no legal obligation to put them in. It might have refused."

In the other case, decided in 1908, the contract between the owner of the industrial plant and the railroad company for the construction of a sidetrack, provided that the railroad company should have the use of the track for other business, when it would not interfere with the business of the industrial plant.

The Court said:

> "Can a sidetrack or any part of a railroad be intended for the public use which one private party can control to the exclusion of all others? The question answers itself."

These decisions were the prelude to the enactment by the Michigan Legislature, at the session of 1909, when enacting the Act for the Regulation of Common Carriers and creating the Michigan Railroad Commission, to include therein the following as Subdivision (b) of Sec. 6:

> "(b) Every railroad shall provide a reasonable, adequate and suitable spur track to and to and upon the grounds of any mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock or other industry or enterprise, wherever such spur track does not necessarily exceed two miles in length and is practically indispensable to the successful operation of any such industry or enterprise, and shall connect such spur track with its main track and operate the same in connection therewith; Provided, That such railroad may require the person or persons, firm, corporation or association primarily to be served thereby, to pay the legitimate cost and expense of acquiring by condemnation or purchase where necessary the rights of way for such spur track, and of constructing the same, in which case the total estimated cost thereof shall be deposited with the railroad before the railroad shall be required to incur any expense whatever therefor. No railroad shall, however, be required to provide a spur track where it is unusually unsafe and dangerous; Provided, that in the event of the failure of said shipper and the said railroad to agree, the necessity for, reasonableness of and practical safety of such spur track and connection and the operation thereof shall be decided by the said Michigan Railroad Commission upon complaint and hearing as provided in section twenty-two of this act."

The public nature of a spur, built by a railroad company at the expense of an industrial plant (and the title and complete ownership of the spur passing to the railroad company) is sustained because of such title and ownership and on the theory that other plants along the line of the spur are in existence or may come into existence, and the public nature of the spur be thereby established as a fact (*Union Lime Co. vs. Chicago & N. W. Ry. Co.*, 233 *U. S.*, 211).

The spur in question in that case was to be built under the Wisconsin statute, which required any other industrial plant desiring connection with the spur to pay to the industrial plant at whose expense the spur was built, "an equitable proportion" of such expense.

The Michigan statute contains no such provision.

Where the owner of an industrial plant pays for the right of way and the construction of a spur for his convenience, he has an interest in it, although the title passes to the railroad company. His interest is a property right, which prevents the spur from becoming a public spur, until he is compensated for a portion of his outlay.

A spur built under the statute in a manufacturing district has possible public attributes, which can never attach to a logging spur for a single lumberman, built in the devastated timber regions of Northern Michigan.

This record makes two propositions of fact very clear:

1. The Tubbs Branch was ordered restored for the exclusive use and control of the Fletcher Paper Company.
2. If by any possibility some other timber owners may have occasion to make use of the branch, they can only do so by permission of the Fletcher Paper Company, and on such terms as may be agreed upon.

We have tried to make a correct and intelligible statement of the case now before the Court.

I.

The first question to be determined in this case is whether the decision of the Supreme Court of Michigan, granting a mandamus compelling the relaying of rails on the half mile of track taken up and the resumption of service on the branch can be sustained as due process of law in view of the fact that the case in the Wayne Circuit was still pending and undetermined.

The strongest and most fundamental requirement of the law of the land or due process of law is that notice and a hearing and a judgment must precede execution.

In this particular, the clause of Magna Charta, "unless by the lawful judgment of his peers or the law of the land" had the same meaning in 1215 that it has in 1915.

McKechnie's Magna Charta, p. 434, shows that the object of the clause was to forbid the King in the future from placing execution before judgment.

> "Its main object was to prohibit John from resorting to what is sometimes whimsically known in Scotland as Jeddart justice."
>
> "The same grim tradition applied to Lidford as to Jedburg."
>
> "I oft have heard of Lydford law,
> How in the morn they hang and draw,
> And sit in judgment after."

The identical statute under which the Michigan Railroad Commission granted its order of August 3, 1913, provides that the aggrieved party may within thirty days file a bill in the proper Circuit Court in Chancery, contesting an order of the commission on the ground that it is unlawful or unreasonable.

The suit on such a bill is a mere continuation of the hearing before the commission. This is conclusively shown by Sec. 26,

Subsection (c) of the act, which reads (*Michigan Public Acts* 1909, p. 723):

> "If, upon the trial of said action, evidence shall be introduced by the complainant which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court, before proceeding to render judgment, unless the parties in such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon receipt of such evidence the commission shall consider the same, and may alter, modify, amend or rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulations, practice or service complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence. If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order."

Mandatory orders requiring the expenditure of money or the devotion of property to the public use, like the order of August 3, 1913, are necessarily suspended until the hearing and adjudication are ended and a final judgment rendered.

Putting the order of August 3, 1911, in effect pending the case in the Wayne Circuit would require the railroad company to restore the track taken up and resume service on the branch; and it would grant to the complaining party, the Fletcher Paper Company, all the relief it prayed. The order of the commission would be wholly executed, and the suit in the Wayne Circuit an idle ceremony.

An order requiring the expenditure of money does take property, and the owner must be compensated before the order is enforced (*Missouri Pac. Ry. vs. Nebraska*, 217 *U. S.*, 196).

The allowance by Mr. Justice Day of a writ of error and the approval of a supersedeas bond prevented the execution of the order of August 3, 1913, as commanded by the writ of mandamus granted by the State Supreme Court.

The Michigan Legislature was under no obligation to provide a special proceeding for the review of the orders of the Michigan Railroad Commission in the courts. That could have been omitted without violating the due process of law clause of the Fourteenth Amendment (*Louis. & Nash. R. vs. Garrett,* 231 *U. S.,* 298, 310).

Why? Simply because the judicial power of either the state or the federal courts could nevertheless be invoked to test by a regular judicial inquiry the constitutionality or legality of the orders of the commission.

The State Legislature could not make the findings and orders of the commission conclusive and final (*Chicago, etc., R. V. Minnesota,* 134 *U. S.,* 418).

Administrative tribunals may be authorized to make final decisions and orders in certain classes of cases.

Such are the decisions of the Supreme Court of the United States in the case of a duty on imports of *Cary vs. Curtis,* 3 *How.,* 236, and in the exclusion case of *Ekiu vs. United States,* 142 *U. S.,* 651, 660, and in the alien deportation case of *Fong Yue Ting vs. United States,* 149 *U. S.,* 698, and in other like cases.

But all these cases concerned goods and merchandise, or persons, which had not become a part of the general body of things or persons within the jurisdiction of the United States, or the persons concerned were not citizens of the United States, but were aliens, and as such subject to be deported at the pleasure of the United States.

Cary vs. Curtis, 3 *How.,* 236, concerned the constitutionality of the Act of Congress of March 3, 1839 (5 U. S. Stat., 548), which required all collectors of customs to place to the credit of the United States all money received by them "for unascertained duties or for duties paid under protest;" and which further provided:

"But whenever it shall be shown to the satisfaction

> of the Secretary of the Treasury that in any case of unascertained duties or duties paid under protest, more money has been paid to the collector or to the person acting as such than the law requires should have been paid, it shall be his duty to draw his warrant upon the treasurer in favor of the person or persons entitled to the overpayment, directing said treasurer to refund the same out of any money in the treasury not otherwise appropriated."

The Court, in an opinion by Mr. Justice Daniel construing the act, held that Congress intended to prohibit actions against collectors of customs for money exacted by them and paid under protest, such as had been held maintainable in *Elliott vs. Swartwout,* 10 *Pet.,* 137.

The Court then proceeded to consider the question whether the act as so construed was constitutional, and the conclusion was reached that it was a valid act of Congress.

Among the reasons advanced were (1) That the United States were not subject to suits without their consent, and (2) That courts created by Congress under the power to establish courts inferior to the Supreme Court, can only have such jurisdiction and power as may be conferred by Congress.

Continuing the opinion makes this statement:

> "In devising a system for imposing and collecting the public revenue, it was competent for Congress to designate the officer of the government in whom the rights of that government should be represented, in any conflict which might arise, and to prescribe the manner of trial. It is not imagined, that by so doing Congress is justly chargeable with usurpation, or that the citizen is thereby deprived of his rights. There is nothing arbitrary in such arrangements; they are general in their character; are the result of principles inherent in the government; are defined and promulgated as the public law. A more striking example of the powers exerted by the government, in relation to its fiscal concerns, than is seen in the Act of 1839, is the power of distress and sale, authorized by the Act of Congress of May 15, 1820 (3 Story, 1791), upon adjustments of accounts by the First Comptroller of the Treasury. This very strong and summary proceeding

has now been in practice for nearly a quarter of a century without its regularity having been questioned, so far as is known to the court. The courts of the United States can take cognizance only of subjects assigned to them expressly or by necessary implication; *a fortiori*, they can take no cognizance of matters that by law are either denied to them or expressly referred *ad aliud examen*."

The Court then proceeded to make an elaborate examination of the equitable principles which are the foundations of the action of assumpsit for money had and received, and reached the conclusion that such an action would not lie where the law required the officer receiving the money to pay it into the Treasury to credit of the United States.

As to other remedies open to the aggrieved party the Court said:

"The claimant had his option to refuse payment; the detention of the goods for the adjustment of duties, being an incident of probable occurrence, to avoid this it could not be permitted to effect the abrogation of a public law, or a system of public policy essentially connected with the general action of the government. The claimant, moreover, was not without other modes of redress, had he chosen to adopt them. He might have asserted his right to the possession of the goods, or his exemption from the duties demanded, either by replevin or in an action of detinue, or perhaps by an action of trover, upon his tendering the amount of duties admitted by him to be legally due. The legitimate inquiry before this court is not whether all right of action has been taken away from the party, and the court responds to no such inquiry. The question presented for decision, and the only question decided, is whether, under the notice given by the statute of 1839, payments made in despite of that notice, though with a protest against their supposed illegality, can constitute a ground for that implied obligation to refund, and for that promise inferred by the law from such obligation, which are inseparable from and, indeed, are the only foundation of a right of recovery in this particular form of action. And here is presented the answer to the assertion that by the Act of 1839, or by the construction given to it by this court, the party is debarred all access to the courts of justice and left

> entirely at the mercy of an executive officer. Neither have Congress nor this court furnished the slightest ground for the above assertion."

Two of the learned Justices of the Court delivered dissenting opinions.

Justice Story stated the objections to executive tribunals of exclusive and final jurisdiction as follows:

> "I regret exceedingly being compelled by a sense of duty to express openly my dissent from the opinion of the majority of the court in this case. On ordinary occasions my habit is to submit in silence to the judgment of the court where I happen to entertain an opinion different from that of my brethren. But the present case involves, in my judgment, doctrines and consequences which, with the utmost deference and respect for those who think otherwise, I cannot but deem most deeply affecting the rights of all our citizens, and calculated to supersede the great guards of those rights intended to be secured by the constitution through the instrumentality of the judicial power, state or national. The question, stripped of all formalities, is neither more nor less than this: Whether Congress have a right to take from the citizens all right of action in any court to recover back money claimed illegally, and extorted by compulsion, by its officers under color of law, but without any legal authority, and thus to deny them all remedy for an admitted wrong, and to clothe the Secretary of the Treasury with the sole and exclusive authority to withhold or restore that money according to his own notions of justice or right. If Congress may do so in the present case, in the exercise of its power to levy and collect taxes and duties, and thus take away from all courts, state and national, all rights to interpret the laws for levying and collecting taxes and duties, and to confide such interpretation to one of its own executive functionaries, whose judgment is to be at once summary and final, then I must say, that it seems to me to be not what I had hitherto supposed it to be; a government where the three great departments, legislative, executive, and judicial, had independent duties to perform each in its own sphere; but the judicial power designed by the Constitution to be the final and appellate jurisdiction to interpret our laws, is superseded in its most vital

and important functions. I know of no power, indeed, of which a free people ought to be more jealous, than of that of levying taxes and duties, and yet if it is to rest with a mere executive functionary of the Government absolutely and finally to decide what taxes and duties are leviable under a particular act, without any power to appeal to any judicial tribunal, it seems to me that we have no security whatsoever for the rights of the citizens. And if Congress possess a constitutional authority to vest such summary and final power of interpretation in an executive functionary, I know no other subject within the reach of legislation which may not be exclusively confided in the same way to an executive functionary; nay, to the executive himself. Can it be true that the American people ever contemplated such a state of things as justifiable or practicable under our Constitution? I cannot bring my mind to believe it; and, therefore, I repeat it, with the most sincere respect for my brethren who entertain a different opinion, I deny the constitutional authority of Congress to delegate such functions to any executive officer, or to take away all right of action for an admitted wrong and illegal exercise of power in the levy of money from the injured citizen."

Justice McLean was equally clear.

He said:

"Feeling as I do, an unfeigned respect for the opinion of the judges who differ from me, yet I cannot, without concern, look at the consequences of the principle established in this case. The right of a citizen to resort to the judicial tribunals of the country, Federal or State, for redress for an injury done by a public officer, is taken away by the construction of an act of Congress, which, in my judgment, bears no such construction. But I will take higher ground, and say that Congress have no constitutional power to pass such an act as the statute of 1839 is construed to be by this decision.

"By the 2d section of the 3d article of the Constitution of the United States, the judicial power extends to all cases in law and equity arising under the Constitution and laws of the Union. And by the 7th section of the amendments to the Constitution it is provided that in suits at common law, where the value in con-

troversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

"The act of 1839, in my judgment, does not conflict with either of the above constitutional provisions. But if it take away the right of the citizen to sue in a court of law, for the injury complained of, as construed by my brethren, then it is in direct conflict with both of the above provisions.

"In the matter of private right it takes from the judiciary the power of construing the law, and vests it in the Secretary of the Treasury, the executive officer under whose sanction or instruction the wrong complained of was done. And, in the second place, it takes from the citizen the right of trial by jury, which is expressly given to him by the Constitution.

"A citizen of the United States by birth or naturalization is entitled to all the personal and property rights sought to be protected by our constitutional guarantees, and among them the right to a jury trial on any criminal accusation, and to due process of law in any proceeding to deprive him of his life, liberty or property."

The practical difference between the opinion of the Court, and those of the dissenting judges may be stated as follows:

The effect of the opinion of the court was that a person seeking to bring foreign goods into the United States could not pay under protest illegal duties demanded by the collector and then sue the collector in an action of assumpsit for money had and received; but he could make a tender of the legal duties, if any were due, and then bring detinue or replevin for his goods, or trover for the value of them. If the importer brought detinue or replevin he would get possession of his goods, and neither the collector or the Treasury would get any money; nor would they get any money if the importer brought trover. The goods would remain in possession of the collector and when the importer obtained a judgment for their value, title to the goods would pass to the collector and he could dispose of them as he saw fit, to enable him to pay the judgment against him. A more unsatisfactory way of contesting and defeating illegal duties could not be devised.

Ever since 1833, a statute has been in force, (Rev. Stat. U. S. Sec. 934), which reads:

"All property taken or detained by any officer or

other person, *under authority* of any revenue law of the United States, shall be irrepleviable and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

Congress was in session when *Cary vs. Curtis* was decided; whereupon an explanatory Act (5 *U. S. Stat.* 727) was passed that the Act of 1839 should not be construed to prevent the payment of duties under protest and actions for the recovery of the money; but requiring the protest to be writing; and it took from the Secretary of the Treasury the authority to refund. *Barney vs. Watson*, 92 *U. S.* 449; *Arnson vs. Murphy*, 109 *U. S.* 238.

The Act of 1845 remained in force until it was repealed by implication by the Act of June 30th, 1864, 13 *U. S. Stat.* 214.

The Act of 1864 is Sections 2931, 3012½ and 3013 of the Rev. Stat. of U. S. of 1878.

These sections remained in force until the Act of June 10, 1890. 26 *U. S. Stat.* 131, 137, 138, 141.

The Act of 1890 was amended by the Act of May 27, 1908, 35 *U. S. Stat.* 403.

In 1909 a judicial court known as the Court of Customs Appeals was created with jurisdiction to hear all customs cases. 36 *U. S. Stat.* 105, 1143.

All of these acts of Congress except the Act of 1839 gave importers the right to get possession of their goods by paying under protest the duties demanded, and allowing them to bring actions in the courts to get their money back. The restrictions governing these actions varied in the different acts, but none of the acts refused a hearing and inquiry in a duly constituted court of justice.

We shall assume that if Congress could prohibit actions for money received for the recovery of illegal duties, it could prohibit all other actions, and restrict the aggrieved importer to his remedy of paying the duties demanded by the collector and then appealing to, or laying his claim before the Secretary of the Treasury, or such other administrative tribunal Congress might establish.

We make this assumption on the authority and reasoning of the exclusion case of *Ekiu vs. United States,* 142 *U. S.* 651 660, and the alien deportation case of *Tong Yue Tong vs. United States,* 149 *U. S.* 698, on the theory that if such administrative tribunals can exist to keep aliens out of the country they can also be used to keep foreign goods out of the country.

But we deny the constitutional validity of any such tribunal when given jurisdiction over American citizens or any of their goods or other property lawfully held by them within the United States.

We have made the foregoing examination of the power of Congress to confer on administrative or ministerial tribunals jurisdiction to make conclusive and final decisions, in order to bring out the full significance of the unanimous ruling of the court in the famous case of *De Lima vs. Bidwell,* 182 *U. S.* 1, which was a common law action at law to recover duties paid under duress and protest on sugar imported from Porto Rico after the ratification of the treaty of peace with Spain of April 11, 1899.

The action was commenced in a state court and removed to the Circuit Court of the United States, which court held that the complaint did not state a cause of action, and that the court had no jurisdiction of the case.

Counsel for Bidwell, the collector of the port of New York, who had forced the payment of the duties, contended that the case was not within the jurisdiction of the court because the statutory remedy of an appeal to the Board of General Appraisers and thence to the courts, was exclusive.

The court by Justice Brown, answered that contention by referring to *Elliott vs. Swartwout,* 10 *Pet.* 137; *Cary vs. Curtis,* 3 *How.* 236; *Arnson vs. Murphy,* 109 *U. S.,* 238, 240. *Barney vs. Watson,* 92 *U. S.* 349, and then at p. 179, saying:

> "The criticism to be made upon the applicability of these cases is, that they dealt only with *imported* merchandise and with the duties collected thereon, and have no reference whatever to exactions made by a collector, under color of the revenue laws, upon goods which have never been imported at all. With respect to these the collector stands as if, under color of his office, he had seized a ship or its equipment, or any

other article not comprehended within the scope of the tariff laws. Had the sugars involved in this case been admittedly imported, that is, brought into New York from a confessedly foreign country, and the question had arisen whether they were dutiable, or belonged to the free list, the case would have fallen within the Customs Administrative Act, since it would have turned upon a question of classification.

"The fact that the collector may have deposited the money in the Treasury is no bar to a judgment against him, since Rev. Stat., Sec. 989, provides that, in case of a recovery of any money exacted by him and paid into the Treasury, if the court certifies that there was probable cause for the act done, no execution shall issue against him, but the amount of the judgment shall be paid out of the proper appropriation from the Treasury.

"We are not impressed by the argument that, if the plaintiffs insisted that these sugars were not imported merchandise, they should have stood upon their rights, refused to enter the goods, and brought an action of replevin to recover their possession. It is true that, to prevent the seizure of the sugars, plaintiffs did enter them as imported merchandise; but any admission derivable from that fact is explained by their protest against the exaction of duties upon them as such. They waived nothing by taking this course. The collector lost nothing, since he was apprised of the course they would probably take. It is true that in the *Fassett Case*, 142 *U. S.*, 479, the proceeding was by libel for possession of the vessel, which is analogous to an action of replevin at common law; but it would appear that Rev. Stat., Sec. 934, would stand in the way of such a remedy here, since by that section 'all property taken or detained by any officer or other person under authority of any revenue law of the United States shall be irrepleviable, and shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.' If the words, 'under authority of any revenue law' are to be construed as if they read 'under color of any revenue law,' it would seem that these sugars could not be made the subject of a replevin; but even conceding that replevin would lie, we consider it merely a choice of remedies, and that the plaintiffs were at liberty to waive the tort and proceed in assumpsit."

"We are all of opinion that this action was properly brought."

Goods or persons lawfully within the United States are not subject to be disposed of by final decisions by administrative tribunals; and thus we are able to see that as applied to such goods or persons, the dissenting opinions of Justice Story and Justice McLean in *Cary vs. Curtis* are correct expositions of the law of the constitution.

The Michigan Act expressly authorizes the filing of a bill in a circuit court in chancery to contest any order of the railroad commission on the ground that it is unlawful or unreasonable, and it requires any testimony taken in the cause to be transmitted back to the commission for its consideration, and a report to the court.

Instructed by the opinion of the court by Mr. Justice Lamar in the recent case of *Wadley South Ry. Co. vs. Georgia* decided January 11, 1915, we respectfully submit:

1. That while in this instance the case in the Circuit Court for the County of Wayne was pending and undecided, it was not competent for the Supreme Court of Michigan by mandamus or other process to compel the Detroit and Mackinac Railway Company to go to the expense of restoring the Tubbs Branch and to resume service thereon.
2. That inasmuch as the order of the Michigan Railroad Commission of August 3, 1911, required the Detroit and Mackinac Railway Company, to make an expenditure of money and to devote a portion of its property to the public use, the writ of mandamus was in effect an interlocutory order granting full relief to the complaining party *pendente lite*, and before final judgment or decree.

We may not have stated these questions as concisely and correctly as they should have been stated by counsel, but the fact is undisputed on this record that the Supreme Court of Michigan granted the writ of mandamus while the case in the Wayne Circuit was pending and undecided, and we submit the subject to the superior learning and ability of this court, with the belief that the writ of mandamus granted by the Supreme Court of Michigan was an attempt to execute before judgment.

II.

The second question in this case is whether the failure of the Michigan Railroad Commission to carry out its agreement to give the Detroit and Mackinac Railway Company a further opportunity to introduce evidence and to be heard, and the refusal of the Michigan Supreme Court to give any such opportunity, was not a deprivation of property without due process of law, and a denial of the equal protection of the laws?

This is a most serious question and is not to be treated as a mere triviality. At the threshold of our inquiry the question arises whether the burden of proof, that the proposed future use of the Tubbs Branch was to be a public use, rested on the Michigan Railroad Commission and the Fletcher Paper Company as the complaining party; or, whether it was incumbent on the Detroit and Mackinac Railway Company to sustain the negative proposition that the contemplated use of the Tubbs Branch was private and not public?

As we understand the decision of this court in *Oregon, R. & N. Co. vs. Fairchild*, 224 *U. S.*, 510, in any proceeding or attempt to take property for the public use it would not be competent to compel the property owner to disprove the public use; and that in the present case the burden of proving a public use was on the commission and the private party seeking to have the property taken.

With this distinction in mind let us examine the proofs and the state of the record in this case.

It appears that the Churchill Lumber Company owned the right of way and had done the grading and furnished the ties for the Tubbs Branch, and it was built for the use of that company.

Three other companies had made use of this branch, viz: The Lobdell-Churchill Company and the Fletcher Paper Company, both of Alpena, and the Emery-Martin Company of Cheboygan; but their use of the branch had been subject to the paramount rights of the Churchill Lumber Company, which had gone to the large expense of doing the grading and furnishing the ties, and of acquiring the right of way.

That company was certainly entitled to make a charge for the use of the branch by other parties, or in case it made no charge, to be reimbursed a portion of the expenditure it had made in securing the branch.

It is not thinkable that the Churchill Lumber Company was compelled to permit the use of the branch by other parties without compensation, and for indefinite periods of time after its own use of the branch had ceased. We think this is conclusive proof that the Tubbs Branch considered by itself was a mere private convenience, resting in private contract, and in no sense a part of the public railroad of the Detroit and Mackinac Railway Company.

In the rate case in which the Michigan Railroad Commission reduced the rates of the Detroit and Mackinac Railway Company for hauling logs from logging branches to Alpena, the Supreme Court of Michigan, 171 *Mich.*, 335, disposed of this question as follows:

> "Complainant is not a private railroad. It does business as a common carrier. Its branch lines have been laid and operated for the convenience of timber owners, it is true, but for the convenience of all of them whose timber was so conveniently reached by the branch. Branches have been extended, new branches have been run from those first laid, and the purpose has been to reach with each branch such timber as was offered for transportation. It has published tariffs giving rates to the ends of branches, and has filed them with the commission. With a single exception, and that does not apply to an Alpena log owner, it does not appear that its rates for transporting timber from any of its branches are contract rates.
>
> "What its duties and liabilities in the operation of its branches are or would have been at common law is not very material. We have no doubt of the power of the legislature to require it to submit those operations to state supervision. The question is whether it has done so, and this question, we think, must be answered in the affirmative."

No matter how far it may be from the truth we are obliged to assume in the present case that the conclusions of the Supreme Court of Michigan were justified by the evidence in that case.

Whether in the present case the evidence introduced by the Fletcher Paper Company as the complaining party at the partial hearing before the railroad commission considered in the light of the answer of the railroad company before the commission, and its answer to the petition for the mandamus justifies a similar conclusion is one of the questions we will now consider.

The Tubbs Branch was built by and for the Churchill Lumber Company which was the owner of all the branch except the rails. Three other parties were permitted to make use of it, viz: The Lobdell-Churchill Company of Alpena, the Emery-Martin Company of Cheboygan, and the Fletcher Paper Company of Alpena.

That was the extent of the alleged public use until the half-mile of track was taken up, and the branch withdrawn from the public service, Sept. 9, 1910.

The partial hearing before the railroad commission did not take place until March 24, 1911, when it appeared that the Churchill Lumber Company had sold the branch to the Fletcher Paper Company, that the Lobdell-Churchill Company and the Emery-Martin Company had withdrawn, leaving the Fletcher Paper Company as the only party desiring to make any further use of the branch.

Sufficient of these facts appeared at the hearing to defeat the alleged public use, unless the burden was on the railroad company to sustain its averment that the future use of the branch would be a private and not a public use.

If this burden of proof did rest on the railroad company it was absolutely essential in order to make the proceeding due process of law, to give it a full opportunity to produce its proofs and evidence, and if the burden was on the Commission no case of public use was made out.

The Supreme Court of Michigan had no right to assume that the Railroad Company could not sustain its defense.

An argument before the Michigan Railroad Commission might have convinced that very fair-minded and just board of officers that the proposed use was private and not public; and it is certain that very little additional evidence would have made the case so clear, that a finding that the use would

be public, would be contrary to the indisputable evidence and an order to restore the branch legally impossible according to the ruling of the court in *Int. Com. Com. vs. Louis. & Nash. R. R.* 227 *U. S.* 88, 91.

An argument sometimes upsets preconceived opinions; and the privilege of making an argument has always been regarded as an essential part of a hearing. The failure of the Michigan Railroad Commission to keep its agreement in this case, not only shut off an argument, but also cut off the right to introduce rebutting and explanatory evidence.

The Michigan Supreme Court cites one of its own rulings that immaterial averments in a response to an order to show cause should not be struck out on motion, but,

> "A better practice is to call the attention of the court upon the hearing to such parts of the answer and accompanying papers as are not entitled to consideration, when they can be eliminated or disregarded," etc. *Erikson vs. Alpena Circuit Judge*, 138 *Mich.*, 133.

That is certainly an easy way of disposing of a troublesome answer, of avoiding an issue of fact, and enabling the court to determine the case on its own view of the facts; but it is hardly due process of law.

The Supreme Court of Michigan makes the opinion and findings of the railroad commission a part of its opinion. (*Record, pp.* 65-71).

The only evidence before the railroad commission was that introduced by the Fletcher Paper Company at the partial hearing. (*Record, pp.* 32-57).

The Supreme Court of Michigan said, *Record, pp.* 72-73:

> "And we are of opinion that the bill of complaint in the Wayne Circuit Court and the opinion of the Alpena Circuit Judge are immaterial and require no consideration, and that the transcript of the testimony taken before the railroad commission on the hearing of the petition for the order of August 3rd, 1911, gives all the information necessary upon this hearing relative to the bill of complaint and answer in the Alpena chancery case, and that it was not necessary to embody those records in the answer of respondent.

"The pleadings in the instant case, the pleadings and testimony returned in the matter of the application of the Fletcher Paper Company against respondent for an order to enforce the order of August 3rd, 1911, pending its review, are all that this court needs to consider. It was, therefore, not necessary to frame issues upon the respondent's answer.

"We are not called upon to consider and determine the merits of the controversy between the Fletcher Paper Company and respondent railway company upon the order of August 3rd, 1911.

"Such questions are involved in the case now pending before the Circuit Court for the County of Wayne, in Chancery, wherein the respondent railway company seeks to review, annul and set aside said order. The sole question before this court in this proceeding is whether the order of the Railroad Commission shall take effect and become operative pending the hearing and determination of that chancery cause."

Referring to the agreement of the railroad commission to give the railroad company an opportunity to introduce evidence and be heard, the Supreme Court of Michigan said (*Record, p.* 72):

"The record indicates that such an undertaking was had, but it is denied in the brief of counsel for petitioner that no notice or opportunity was given to respondent to furnish proofs in the case, and no such claim appears to have been made to the Commission after order was promulgated and before the bill to review the order was filed. The respondent at no time has presented any statement of the nature of the testimony it at that time desired to introduce, or any statement of merits which it could show by such proofs, or that in fact it expected and desired to put in further or other proofs, and exhibits than are shown by the testimony returned in the record.

"Further, the answer of respondent admits all of the material facts charged against it in the petition upon which petitioner relies for the relief asked of the Railroad Commission. Admitting the truth of its contention, it is apparent that no injury to defendant has been done in the neglect to notify it according to agreement."

Comparing the complaint of the Fletcher Paper Company with the answer thereto of the railroad company, (*Record pp.* 5-6, 19-23) we call attention to the following:

1. The allegations of the petition of the Fletcher Paper Company designed to show the public nature of the Tubbs Branch are (*Record, pp.* 5-6):

> "The Churchill Lumber Company provided the right of way, constructed the grade and placed ties belonging to them on a branch leaving the main line of said railway at a point known as Case, Michigan, and extending in a southerly direction a distance approximately five miles to the end of the Tubbs Branch. The said railway laid the steel on said branch, which steel they now own and they have continuously operated said branch by hauling logs over it for the Churchill Lumber Company, the Fletcher Paper Company and the Lobdell-Churchill Company, from the time it was completed, until on or about the eighth day of September, nineteen hundred ten.
>
> "4. That said branch, above referred to, is known as the 'Tubbs Branch' or 'Martindale Spur,' and is so designated in the published freight tariffs of said railway, which tariffs are in the files of the Michigan Railroad Commission (D. & M. Ry. M. R. C. No. 277).
>
> "10. That said railway shows Tubbs Branch or Martindale Spur in its published tariff on logs to Alpena, Michigan, on file with the Michigan Railroad Commission, which tariff is D. & M. Ry. M. R. C. No. 277, Commissioners' Progressive Number 15,095."

2. The response of the railroad company to paragraphs 3 and 4 is in paragraph 2 of the answer, and sub-paragraphs (a), (b), (c) and (d), *Record, pp.* 19-21.

These sub-paragraphs set forth facts concerning the construction, operation and use of the Tubbs Branch, justifying the allegation therein—

> "That no preliminary steps were ever taken to establish a branch for the use of the public. That said branch never became a part of the defendants railroad system whereby it could enforce the perpetual use thereof for the public, and it was recognized by both parties to the original agreement as a track subservient to the mutual use and benefit of the Churchill Lumber

> Company and this defendant and to no other person, firm or corporation save by forbearance or mutual indulgence."

The answer of the railroad company to the 10th paragraph of the complaint of the Fletcher Paper Company, is in the 5th paragraph of the Answer, *Record, p.* 23, which is a categorical denial of the 10th and other paragraphs.

3. Tariff, D. & M. Ry. M. R. C. No. 277, mentioned in paragraphs 4 and 10 of the complaint was introduced in evidence at the hearing, *Record, p.* 47, *marginal p.* 78.

Other tariffs were also introduced. The four tariffs introduced and relied on were:

564 M. R. C. 210, issued Feb. 16, 1909.

669 M. R. C. 277, issued Dec. 21, 1909.

670 M. R. C. 278, issued Dec. 22, 1909.

565-A M. R. C. 300, issued May 7, 1910.

The Tubbs Branch was eliminated from the above tariffs by supplement No. 2 of 565A M. R. C. 300. The supplement was issued July 21, 1910. It was also eliminated by 565-B M. R. C. 321, issued Oct. 6, 1910. (*Record, pp.* 47-48).

4. The findings and opinion of Michigan Railroad Commission which resulted in the order of August 3, 1911, for the restoration of the Tubbs Branch contain this statement, *Record* 67:

> "The records of this department disclose that from the creation of the department the defendant through its public tariff files, has recognized this branch as a part of its general transportation system. (See M. R. C. No. 76, M. R. C. No. 250, M. R. C. No. 265, M. R. C. 274, *M. R. C. No.* 277, M. R. C. No. 279, M. R. C. No. 303)."

None of these tariffs were introduced in evidence at the hearing except No. 277.

So far we have shown the state of the pleadings and proofs before the Michigan Railroad Commission.

We now call attention to the facts set up and properly alleged in the Ninth to the Fifteenth paragraphs of the answer of the Detroit and Mackinac Railway Company in response to the order to show cause why a writ of mandamus should not issue, which paragraphs are as follows (*Record* 13, 15-18).

IX.

"This respondent admits that the rails upon said Tubbs Branch were laid by this respondent, and that the original right of way was acquired by the Churchill Lumber Company, and that the Churchill Lumber Company and this respondent had the exclusive use of the said Tubbs Branch; but this respondent shows that the use of said branch was controlled by the Churchill Lumber Company, and that this respondent made no use of the same except subject to the direction of said Churchill Lumber Company.

X.

"This respondent denies that the said Tubbs Branch was a part of the railroad system of this respondent over which logs and other forest products were transported by this respondent for the public generally, and it denies that the end of the said Tubbs Branch was treated as a station in the published tariffs of said respondent for merchandise generally or otherwise.

"This respondent further shows that it never did any business as a common carrier on said Tubbs Branch and that the said Tubbs Branch always was and still is a mere private spur for the use of the Churchill Lumber Company and the Michigan Railroad Commission has no jurisdiction over the same.

XI.

"This respondent admits that for fifteen years and upwards it has been its practice to enter into contracts with timber operators for the construction and operation of private logging branches; that the timber owners or operators would furnish and own the right of way, do the grading and furnish the ties, and this respondent would furnish and lay the iron and do what ballasting was needed; that said private spurs or branches never became a part of the public railway of this respondent, and no public business as a common carrier was ever carried on thereon; that the rates for the hauling of logs were either fixed by the private contracts aforesaid or left to such reasonable compensation as this respondent was entitled to receive for the private service so rendered; that the rates to be

charged depended upon the amount of timber to be hauled, and the length of time the branch was to be maintained for the purpose of hauling the timber; that this respondent is ready and willing to enter into a reasonable private contract with the Fletcher Paper Company for the restoration of said Tubbs Branch. This respondent respectfully submits that the terms to be agreed upon are a matter of private contract, and that the Michigan Railroad Commission has no jurisdiction over the same.

XII.

"This respondent admits that an application was made to this court in October, 1911, and an order to show cause was granted requiring this respondent to show cause why a mandamus should not issue to compel it to put into force and effect the said order of the Railroad Commission; but this respondent shows that it filed an answer to said petition in response to said order to show cause; that it appeared by said answer and it is now again alleged to be the fact that on the second day of September, 1911, this respondent filed a bill in the Circuit Court for the County of Wayne, in Chancery, to review, vacate and annul the said order of the Railroad Commission of August 3rd, 1911; that a subpoena was issued on said bill and the same with a copy of the bill of complaint, was duly served on the Michigan Railroad Commission, and a copy of said bill of complaint and subpoena and proof of service thereof is annexed to this answer as Exhibit C. This respondent further shows that the Railroad Commission filed an answer to said Bill of Complaint and thereupon the case being at issue, it was referred to an examiner to take proofs in the case, and counsel for the parties have arranged to commence the taking of such proof at Alpena, on the 16th day of November, 1912; that the said cause is still pending and undisposed of.

"This respondent further shows that until proofs are taken in said cause and the case is heard and submitted to the Circuit Court for the County of Wayne, in Chancery, it will have had no opportunity to introduce evidence and to be heard on the facts on which the order of the Railroad Commission is based, or to disprove the allegations of the complaint of the Fletcher Paper Company to the Commission, Exhibit A of the petition of the relator, or to maintain and prove the allegations of its answer to said complaint, Exhibit A of this answer, pp. 9-15; that this respondent has been advised and re-

spectfully submits that the grant the Writ of Mandamus prayed would be a violation of the due process of law and equal protection of the laws, of the 14th Amendment of the Constitution of the United States.

XIII.

"This respondent further answering the petition of the relator shows unto the court that all the allegations contained in the answers and pleadings of this respondent in the Circuit Court for the County of Alpena and before the Michigan Railroad Commission and in the Circuit Court for the County of Wayne, are true, and the plaintiff affirms their truth the same as if said allegations were herein repeated.

XIV.

"This respondent further answering the petition of relator, says that the Tubbs Branch, so-called, was built by the Churchill Lumber Company; the right of way was procured and was owned by that company, and it, also, did the grading and furnished the ties; that the Tubbs Branch is 5 miles, 3,552 feet long and cost the Churchill Lumber Company $8,523.34; that the Detroit and Mackinac Railway Company furnished and laid the steel and ballasted the branch; that the rails used were second hand or worn rails taken up from the main line and used on the branch; that the ballasting was crude, and the whole construction of a temporary nature; that the rails used were of the value of $1,775.89, and the labor of laying the rails and doing the ballasting cost, $9,424.24, making the total cost to the D. & M. $11,200.13 and the cost to both parties a little less than $20,000 for over 5½ miles of construction; that the Churchill Lumber Company permitted other timber operators to make use of the Tubbs Branch, but it charged them fifty cents a thousand for so doing it; that no freight or passenger business was conducted on said branch, and there was no population near said branch to be served; that the only use ever made of said branch was to haul flat cars loaded with logs, use being made of a locomotive of light weight, operated at a slow rate of speed and without any regular service, empty flat cars being taken in when needed, and taken out when loaded, the loading being done by the Churchill Lumber Company, or by the other operators who were permitted to use the branch; that said branch was constructed with the understanding and agreement that when the timber of the Churchill Lumber Company was exhausted the branch would be taken up;

that the agreement between the Churchill Lumber Company and the Detroit & Mackinac Railway Company was that the rates on logs from off the Tubbs Branch to Alpena should be $2.75 per thousand on hemlock logs and $3.75 per thousand on hardwood logs, and said rates were paid by the Churchill Lumber Company until it requested the railroad company to make a uniform rate on logs, which the railroad company did by making the uniform rate from the Tubbs Branch to Alpena $3.25 per thousand; that whatever may be the facts as to other logging branches connected with the public railway of this respondent, the Tubbs Branch has always been a mere private tramway, and in no respect whatever within the jurisdiction of the Michigan Railroad Commission.

XV.

"This respondent further answering shows that the timber lands claimed to be owned by the Fletcher Paper Company are intersected by and the timber thereon is tributary to the Onaway Northern Michigan Railroad, which connects with the respondent's main line at Onaway; that it would cost the Fletcher Paper Company but little more to transport its said timber to Alpena via said railroad than by the Tubbs Branch, and the object and purpose of the Fletcher Paper Company is to saddle that expense onto this respondent by compelling it to restore and maintain the Tubbs Branch without compensation."

Admitting at this point for the sake of the argument that it was competent for the Supreme Court of Michigan to issue a mandamus putting the order of August 3, 1911, in force and effect, pending the suit in the Wayne Circuit in chancery for a review of that order, we contend that it could not do so, until the Detroit and Mackinac Railway Company was given a full and complete hearing before the railroad commission or before the court.

This record as above stated and set forth shows that the Detroit and Mackinac Railway Company was denied any such hearing, and that the judgment of the Supreme Court of Michigan, *Record* 77, granting the writ of mandamus was a plain deprivation of property, without due process of law and a denial of the equal protection of the laws.

The main questions in controversy were: (1) Whether the Tubbs Branch was originally a part of the public railroad of

the Detroit and Mackinac Railway Company, and (2) Whether it was to be restored for the public use.

On both of these questions the railroad company was entitled to make a showing with rebutting and explanatory evidence.

The only evidence introduced before the railroad commission to show a prior public use was (1) the fact that while the Churchill Lumber Company of Alpena, owned and controlled the branch, the Fletcher Paper Company of Alpena, the Lobdell-Churchill Company of Onaway and the Emery-Martin Company of Cheboygan were permitted to make use of the branch subject to the control, and the legal rights, if any, of the Churchill Lumber Company; and (2) the filing by the Detroit and Mackinac Railway Company of its published tariffs as set forth on p. 33 of this brief.

Tariff No. 277 is not the record in this case; it cancelled M. R. C. No. 205 which is set forth in full in the rate case of the *Detroit and Mackinac Railway Company vs. Michigan Railroad Commission*, 171 *Michigan*, 345-353.

It may be referred to as a sample of the tariffs in question.

Supplement No. 2 of No. 565-A, M. R. C. No. 300, and No. 565-B, M. R. C. No. 321, eliminated the Tubbs Branch from the official station list and local distance table of the Detroit & Mackinac Railroad Company.

Supplement No. 2 was issued July 21, 1910, to be effective August 2, 1910; 565-B was issued Oct. 6, 1910, to be effective intrastate Oct. 18, 1910, interstate Nov. 7, 1910 (*Record, pp.* 47-48).

564, M. R. C. 210, was a tariff published Feb. 16, 1909, to take effect Feb. 28, 1909, fixing rates "on logs and lumber from various stations on the Detroit & Mackinac Railway to Onaway, Mich.," and it fixed the rate on logs from "Martindale Spur (Tubbs Branch)" at $1.50 per 1,000 feet with a note: "No regular train service, logs from these points handled at our convenience only."

669 M. R. C. 227, issued Dec. 21, 1909, to be effective Jan. 2, 1910, fixed rates on logs to Alpena.

670, M. R. C. 278, was a tariff issued Dec. 22, 1909, to be effective Jan. 3, 1910, fixing the rates "on hemlock bark, birch and pine bolts, excelsior bolts and pulp wood between various Detroit & Mackinac Railway stations." It fixed rates from "Martindale Spur (Tubbs Branch)," with notes reading "Prepaid station; no agent. No regular train service. Freight handled between these points and main line junctions at our convenience only."

565-A issued May 7, 1910, was an official station list and local distance table in which "Martindale Spur (Tubbs Branch)" was included.

All four of the filings last above named were cancelled as far as the Tubbs Branch was concerned by Supplement No. 2, of July 21, 1910, and subsequent tariffs.

No. 277 added some additional shipping points not in 205, but left in "Martindale Spur (Tubbs Branch)" $3.25, precisely as in No. 205.

No. 277 was issued Dec. 21, 1909, to take effect Jan. 2, 1910, and it could not apply to the Tubbs Branch after it had been eliminated July 21, 1910, and discontinued Sept. 9, 1910. The complaint of the Fletcher Paper Company was not made until Jan. 18, 1911; the partial hearing thereon did not take place until March 24, 1911, and the order of the commission was not granted until August 3, 1911.

The Detroit & Mackinac Railway Company, July 21, 1910, as shown above, had effectually eliminated the Tubbs Branch from its tariffs. The complaint of the Fletcher Paper Company, Jan. 11, 1911, notified the railroad company that the Fletcher Paper Company relied on M. R. C. No. 277, and this was accentuated by the introduction of that tariff in evidence at the partial hearing, March 24, 1911, when the agreement was made that the railroad company should have a further opportunity to make its showing and defense.

While waiting for the promised notice the railroad company had an opportunity to remove any doubt that might exist as to whether its efforts to eliminate the Tubbs Branch had been effectual.

We can assume it took some action to that end, and as it is proper for counsel to state facts they expected to prove at the promised hearing, when it did take place, we are at liberty to say that May 12, 1911, the railroad company filed and published its G. F. D. No. 644, M. R. C. No. 342, which did completely withdraw the Tubbs Branch from public use and service.

In addition to that we would have been able to prove that the Churchill Lumber Company having abandoned the branch by the request to take up the rails of June 8, 1910, the only other parties left, who could use the branch were the Lobdell-Churchill Company of Onaway, and the Emery-Martin Company of Cheboygan, and that both of these had withdrawn, leaving the Fletcher Paper Company as the only person, firm or corporation who could or who desired to make any further use of the branch.

Whatever had been the prior nature of the branch, by August 3, 1911, it had become of a strictly private character and the alleged jurisdiction of the Michigan Railroad Commission over it had come to an end.

Again, 277 was a continuation of M. R. C. 205, which was filed and published at the special instance and request of the Michigan Railroad Commission, and also because the rates fixed by it were through rates for service on the logging branches and service on the main line. With these facts in evidence we think we could have successfully argued to the railroad commission that the Tubbs Branch had never been a public branch, but had always been a private convenience resting in private contract.

It was certainly open to the Detroit and Mackinac Railway Company to show by evidence of facts and by argument that the Tubbs Branch as proposed to be restored would be a private industrial sidetrack within the meaning of the exception in Section 14 of the Act as amended in 1911.

Sec. 14 as amended excepts from the jurisdiction of the commission "private industrial sidetracks."

A sidetrack that is owned and controlled by a private party is not less within the exception because the railroad com-

pany furnished and laid the rail, even if he permits others to use it.

When it appears that the private party owning and controlling a sidetrack is the only party that can use it, there can be no doubt but that it is within the words "private industrial sidetracks."

On the face of this record it affirmatively appears that the Michigan Railroad Commission did not live up to its agreement to give a further hearing; and a sufficient excuse for not doing so is not shown.

The argument of the Supreme Court of Michigan that we should have made a motion before the railroad commission for a rehearing and disclosed what we expected to prove before filing the bill in the Circuit Court for the County of Wayne, in Chancery, contesting the validity of the order of August 3, 1911, on the ground that the railroad company had not been given a hearing, is fallacious.

Answering a similar argument in *Roller vs. Holly,* 176 *U. S.,* 398, 409, this court said:

> "Very probably, too, the court which rendered the judgment would have set the same aside and permitted him to come in and defend; but that would be a matter of discretion—a contingency he was not bound to contemplate. The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

It never has been the law, and we do not think it ever will be the law, that in order to secure a hearing, the defendant must first submit his case to the court, to enable the court to determine whether he has any defense that would do him any good; and if he has no such defense to deny any hearing.

We followed the statutory remedy; which is the remedy enjoined by the due process of law clause of the Fourteenth Amendment.

This court has held that orders by a board like the Michigan Railroad Commission, without notice and a hearing or if that granted was manifestly unfair, is not due process of law, and is void; and should be so declared by any court

in which the question is raised. *Interstate Com. M. vs. Louisville and Nashville R. R. Co.,* 227 *U. S.* 88, 91.

Without placing our sole reliance on the main facts of the case, we have endeavored to show that the order of August 3, 1911, if enforced, will seriously impair the property rights of the Detroit and Mackinac Railway Company.

The Supreme Court of Michigan seems to have had some conception of the dilemma with which it was confronted, for it did require the Fletcher Paper Company to file an indemnity bond of $10,000.

We deny the power of the court to deprive a party of his or its constitutional right to a hearing in a case like this by any such contrivance.

We respectfully submit that the failure of the Michigan Railroad Commission to carry out its agreement to give a further hearing, must be regarded the same as if no hearing was granted or perhaps it is better to say, that the hearing granted was manifestly unfair.

In effect the opinion of the Supreme Court of Michigan struck out the answers of the railroad company and then entered judgment against it, contrary to the opinion of this court in *Hovey vs. Elliott,* 167 *U. S.* 409.

III.

The indemnity bond of $10,000 filed by the Fletcher Paper Company by direction of the Supreme Court of Michigan as a condition precedent to the issuing of the writ of mandamus, does not cure the error of that court in awarding the mandamus.

The order of the court and the bond will be found in Record at pp. 77, 78.

The Michigan Constitution of 1908 which took effect January 1, 1909, contains the following provisions:

ARTICLE XIII.

"EMINENT DOMAIN.

"Section 1. Private property shall not be taken by the public nor by any corporation for public use, without *the necessity therefor being first determined and just* compensation therefor being first made or secured in such manner as shall be prescribed by law.

"Section 2. When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury of twelve freeholders residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law: Provided, That the foregoing provision shall not be construed to apply to the action of commissioners of highways or road commissioners in the official discharge of their duties."

These constitutional provisions are a part of the *laws* of Michigan covered by the "equal protection of the *laws*" clause of the Fourteenth Amendment.

Under these sections the necessity for the proposed public use and the compensation to be paid must be first determined by some kind of a tribunal; but by the second section, if the taking is not by the State, the questions of public

necessity and of compensation must be determined by a jury of freeholders or by commissioners appointed by a court of record.

It is plain that under either section the public use and the necessity must be established by a judgment of expropriation before there can be any taking and until this is done, the question whether the compensation is to be first paid or secured is not reached.

If the commissioners or a jury find that the use to be made of the property is not a public use, there can be no public necessity and there can be no compensation.

Whether the use proposed is public or private is the primary and paramount question and if it is private there can be no taking. This is the law of Michigan as we find it expressed in the Constitution of the State. The denial of the protection of that law is a violation of the equal protection of the laws clause of the Fourteenth Amendment, unless this court is bound to accept the order of the Supreme Court of Michigan awarding the mandamus, as a decision by that court, that it is not the law of the state.

Be that as it may, the due process of law clause of the Fourteenth Amendment forces the same conclusion; for, by that clause a taking for private use is absolutely forbidden.

If the proposed use is public the question of necessity in the absence of anything in the state constitution to the contrary may be determined by the legislature, or by executive or administrative officers or a court by authority of the legislature, and without any notice or hearing.

People vs. Smith, 21 *N. Y.* 595, 598.
Ford vs. Chicago & N. W. R. R. Co., 14 *Wis.*, 609.
Sholl vs. German Coal Co., 118 *Ill.* 427.
Water Works Co. vs. Burkhart, 41 *Ind.* 364.
Cooley's Const. Lim., 7th ed., 777-778.

But it must appear that the purpose is public and not private for taking property for a private purpose is a deprivation of property without due process of law.

Missouri Pac. R. R. Co. vs. Nebraska, 164 *U. S.* 403.
Matter of Tuthill, 163 *N. Y.* 133, 138.
Falsbury Power Co. vs. Alexander, 101 *Va.*, 98.

The Nebraska case and the present case are as nearly alike as two cases can be and not be exactly alike.

In the New York case a provision in the constitution of the state authorizing a taking for a private purpose was held invalid because a violation of the due process of law clause of the Fourteenth Amendment.

In the Virginia case a private corporation was authorized to condemn property "for the company's use or for the use of other individuals or corporations." Held invalid because the interest of the public, if any, is vague, indefinite and uncertain, and may at any time be denied or withdrawn by the company.

A stronger case to the same effect is that of *Berrien Springs Water Power Co. vs. Circuit Judge,* 133 *Mich.,* 48.

If the Tubbs Branch had ever been in the public service, it was withdrawn therefrom Sept. 9, 1910, when part of it was taken up. As to that branch the Detroit and Mackinac Railway Company was under no contract obligations to the Fletcher Paper Company, and if it was, the obligations rested in private contract and were not in the nature of duties to the public.

To meet this situation the Fletcher Paper Company had acquired August 3, 1910, title to the Tubbs Branch by purchase from the Churchill Lumber Company, and assuming the branch to be public filed its bill in the Alpena Circuit in Chancery to compel the railroad company to restore it and renew service on it.

The railroad company answered alleging the branch to be private.

The case was tried in Alpena Circuit Nov. 22, 1910, and taken under advisement by the court.

January 18, 1911, the Fletcher Paper Company filed its complaint before the Michigan Railroad Commission claiming the same relief. The first appearance of the parties before the Commission was March 24, 1911. A few days before that date Judge Emerick of the Alpena Circuit filed his opinion holding the Tubbs Branch to be private and dismissing the bill; but subsequently in entering the decree, dismissed the bill without prejudice to a proceeding before the Michigan Railroad Commission.

In that way the question whether the branch was public or private was relegated to the commission.

The question whether the decision of the Alpena Circuit Court was binding on the Commission was submitted to the Commission March 24, 1911, and taken under advisement, with the distinct understanding and agreement, subsequently reduced to writing, that if the commission concluded to entertain the case, it would give the railroad company and its counsel notice and an opportunity for a further hearing.

We have here recited these facts to make it clear that the only question to be determined at the further hearing was whether the Tubbs Branch was public or private; that was the vital question in controversy.

The railroad commission, without giving any further hearing, decided the disputed question against the railroad company, by granting the order of August 3, 1911.

While the validity of that order was in litigation in the suit instituted by the railroad company, under the statute, in the Circuit Court for the County of Wayne in Chancery, the Supreme Court of Michigan granted the mandamus compeling the railroad company to restore and resume service on the branch, although there has been no hearing either before the railroad commission or in the Supreme Court, at which the railroad company could show that the Tubbs Branch has always been and if restored would certainly be a private convenience and not of a public nature.

Concisely stated the question to be decided is whether it would be due process of law, to take private property on a mere allegation that it was taken for the public use, and before any hearing, on condition that the moving party would file an indemnity bond to reimburse the owner if, after a hearing, it should be found that the purpose was private and not public?

Such a procedure would put the cart before the horse; it would execute before judgment; and the bond of indemnity would not save it from being denounced by this court.

The owner of the property would be deprived of it for a private purpose and left to his remedy by an action on the bond. In short he would be compelled to sell his property to a private person for private use, and have the price determined by a jury, with the risk that he might not be able to collect his judgment.

The indemnity bond is a constitutional monstrosity.

In *Foule vs. Mann,* 53 *Ia.,* 42, the Court held unconstitutional a state statute which substituted an action on an indemnity bond in place of the action of replevin.

IV.

The question whether the Tubbs Branch, if restored, will be public or private is only incidentally before this court.

On the present record the question is whether the answer of the railroad company before the railroad commission, and its answer to the order to show cause why the mandamus should not be issued, set up sufficient facts and made proper averments, to entitle it to a hearing and an opportunity by the testimony of witnesses and other proofs to show that the proposed use of the Tubbs Branch was private and not public.

On the facts alleged and the averments made, it is clear, that the proposed use is private.

The opinion of this court in the *Pipe Line Cases,* 234 *U. S.,* 548, has furnished counsel with valuable instruction, because the court was unanimously of the opinion that the owners of a pipe line which they use to carry oil from their own wells to their own refineries are engaged in a private business and are not subject to the jurisdiction, regulation and control of Congress or the Interstate Commerce Commission. The court itself held that the limit of governmental interference was reached when it was extended to pipe lines the owners of which bought the oil from other parties and transported it by their own pipe lines to their own refineries.

The monopolistic features of such pipe lines was the controlling factor.

Applying the reasoning of the court to the logging branches of the Detroit and Mackinac Railway, we respectfully submit:

1. It appearing that these logging spurs or branches were built by single lumbermen who owned and control them, and other parties could not use them except by their permission, it is as plain as anything can be that such logging spurs and branches are strictly of a private nature.

2. It further appearing that the Tubbs Branch, if restored, will only be used by the Fletcher Paper Company, there being no other parties who desire to use it, and there can be no public business thereon, all doubts if any otherwise exist as to the private nature of this particular branch, have been completely removed.

We do not submit these propositions for the purpose of having this court on this record decide that the Tubbs Branch as it originally existed or as it is to be restored, is private.

Our purpose is to make it clear that the case of the Detroit and Mackinac Railway Company is a strong one; and neither the Michigan Railroad Commission or the State Supreme Court, should have decided against the company without a full and fair hearing.

However, we do contend that on the facts set up by the railroad company in its answers the Tubbs Branch has always been, and if restored, will be private and not public.

It is settled law in Michigan that requiring railroad companies to construct at their own expense, highway crossings, farm crossings, or drainage culverts, is a taking without compensation and forbidden by the due process of law clause.

Chicago, etc. R. Co. vs. Chappel, 124 *Mich.,* 72.
People vs. D., G. H. & M. R. Co., 79 *Mich.,* 471.
Chicago, etc. R. Co. vs. Hough, 61 *Mich.,* 507.
People vs. Lake Shore R. Co., 52 *Mich.,* 277.

And this court has held that a serious interruption to the common and necessary use of property is a taking of it. *Pumpelly vs. Canal Co.,* 13 *Wall.,* 168.

The opinion of the court by Justice Miller is a classic and we quote from it the following:

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the

government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent can in effect, subject to it total destruction without making any compensation, because in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

V.

The Tubbs Branch was never a part of the statutory and public railroad of the Detroit and Mackinac Railway Company to the extent or in the sense that the company could not withdraw service thereon.

If the filing of the tariffs M. R. C. 205, and M. R. C. 277, tendered the use of the branch to the public, consisting of the Lobdell-Churchill Company and the Fletcher Paper Company, both of Alpena, and the Martin-Emery Company of Cheboygan, the Detroit and Mackinac Railway Company was at liberty to withdraw that service at any time, especially when the "public" became reduced to the Fletcher Paper Company.

The law on this subject we submit was correctly stated by Mr. Justice McKenna in his dissenting opinion in the *Pipe Line Cases*, 234 *U. S., at p.* 565, 567, where he reviews the cases which sustain the power to regulate when the owner of private property devotes it to a use in which the public has an interest, and then says:

> "In the *Munn Case* it was said of the owners of the elevators that there was no attempt to grant the public an interest in their property, but to declare their obligations if they used it in this particular manner. And further, 'he may withdraw his grant by discontinuing the use; but as long as he maintains the use he must submit to the control.' "

We respectfully submit that the judgment of the Supreme Court of Michigan should be reversed, and that the order of the Michigan Railroad Commission of August 3, 1911, should be held void for want of a full and fair hearing.

The rule of the fundamental law requiring notice and a hearing before judgment is like a thing of beauty, and

> "A thing of beauty is a joy forever:
> Its loveliness increases; it will never
> Pass into nothingness; but still will keep
> A bower quiet for us, and a sleep
> Full of sweet dreams, and health, and quiet breathing."

JAMES MCNAMARA,

FRED A. BAKER,

Counsel for Detroit & Mackinac Ry. Co.

FILED
OCT 29 1915
JAMES D. MAHER

Supreme Court of the United States

October Term, 1915.

No. 68.

DETROIT & MACKINAC RAILWAY COMPANY,
Plaintiff in Error.

vs.

MICHIGAN RAILROAD COMMISSION AND
FLETCHER PAPER COMPANY,
Defendants in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

JAMES MCNAMARA,
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STATEMENT.

The learned counsel for the defendants in error in the brief filed by them make their own statement of the case, in which they omit and ignore the vital and controlling fact in the case, and seek to avoid the effect of it by lodging with the clerk of this Court certified copies of the following papers:

1. A report bearing date December 20, 1912, of the Michigan Railroad Commission to the Circuit Court of the County of Wayne, in Chancery, to the effect that the Commission had carefully considered the testimony taken before the Court, and transmitted by it to the Commission for its consideration under Sec. 26 of the Statute, and that the Commission had reached the conclusion that the order of August 3, 1911, "should not be reconsidered, altered, amended or modified in any particular." *Brief for Defendants in Error,* p. 10.

2. A letter, dated June 13, 1911, of the Michigan Railroad Commission to Mr. James McNamara, the General Counsel of the Detroit & Mackinac Railway Company. *Id.,* pp. 11, 12.

3. A letter in reply by Mr. McNamara to the Commission, dated July 3, 1911. *Id.*, pp. 12, 13, 14.

The brief of the learned counsel states that these papers have been filed with the clerk. *Brief for Defendants in Error, near top of page* 11 *and top of page* 15.

The clerk of this Court informs us that these certified copies have been *lodged* with him, but have not been filed, and cannot be unless counsel for the plaintiff in error consents thereto.

We do not consent and cannot consent unless the plaintiff in error is permitted to show that the correspondence only related to the question whether the proceedings in the Circuit Court for the County of Alpena were a bar to the proceedings before the Michigan Railroad Commission, and did not in any sense whatever rescind or do away with the written agreement on the part of the Commission that if it held that the Court proceedings were not a bar the "respondent should have an opportunity to introduce evidence in support of the answer which it had filed to the said complaint of the Fletcher Paper Company," as alleged in the answer of the Railroad Company to the petition for the mandamus. *Record, p.* 14, *fol.* 23.

The answer of the Railroad Company to the complaint of the Fletcher Paper Company before the Michigan Railroad Commission set up the facts and insisted that the Tubbs Branch (and all the other logging branches) had never been made a part of its statutory and public railroad, was strictly private, and not subject to any governmental control. *Record, pp.* 19-23.

That is the question on which the Railroad Company was entitled to a full and fair hearing either before the Railroad Commission, or the Supreme Court of the State on the application for a mandamus.

The Michigan Railroad Commission did not give the Railroad Company any such hearing, and for that reason its order of August 3, 1911, is a mere administrative fiat and absolutely void.

Being void, it furnished no ground or basis for the writ of mandamus.

And the Railroad Company, when the case in the Wayne Circuit is submitted to that Court, will be entitled to decree that the order of August 3, 1911, is void and of no force or effect, without regard to the question whether the Tubbs Branch is public or private.

Further than that the Railroad Company will be entitled to a like decree because on the indisputable evidence the Tubbs Branch always has been private, and if not, that it had become private when the order of August 3, 1911, was granted.

We will conclude this "statement" by calling the attention of the Court to the fact that the correspondence printed in the brief for the defendants in error at pp. 11, 12, 13 and 14, and lodged with the clerk of this Court, but not filed, plainly indicates that it relates entirely to the question (which had been submitted to the commission), whether the proceedings in the case in the Alpena Circuit were a bar to the proceedings before the Commission, and was no waiver of notice and hearing on the question whether the Tubbs Branch had been or had become a private industrial spur.

The letter of the Commission to Mr. McNamara simply states "that it was the suggestion of the Commission that the case hardly needed reargument, but that the Commission would receive briefs from both sides," meaning briefs on the question whether the proceedings in the Alpena Circuit were a bar.

The Commission goes on to say that Mr. Clark, one of the counsel for the Fletcher Paper Company, had intimated that submitting briefs would be agreeable to his firm.

> "He also suggested that he would be pleased to add the decree of the Court to the record," meaning the decree of the Alpena Circuit which had not been entered at the time the plea in bar was submitted to the Commission.

The letter then says:

> "It was suggested that this might be done by stipulation."
>
> "Will you please take the matter up with Messrs.

> Gillet & Clark and arrange for the filing of briefs, and such further matters as you wish to add to the record," meaning the record in the Alpena Circuit, or any other record bearing on the question whether the proceedings in the Alpena Circuit were a bar to the proceedings before the Commission.

In his reply Mr. McNamara went over that question elaborately, but said nothing whatever by which it can be inferred that he waived the right to notice and a hearing on the question whether the Tubbs Branch had been or had become a mere private spur.

At page 28 of their brief counsel for defendants in error quote (and partly print in italics) from a statement made by Mr. McNamara during the progress of the hearing before the Commission, March 24, 1911, as appears by the record in this case at p. 54.

We will quote the entire statement made by Mr. McNamara with our own italics:

> "I suppose that this plea that I interpose—I didn't want to take any part in the case, any more than presenting my plea, the same as I would demur in Court to the jurisdiction of the Court, and I presume the practice would be at any Court. I don't know how it is before the Commission, but if the Commission arrives at the conclusion that my plea in bar is not well taken, *they will notify me if we desire to put in proof, either to put it in or not to put it in.* In other words, we should stand on the plea in bar or stand on our demur in the plea. That is simply a suggestion I make to the Commission; whatever the commission does."

In pursuance of the suggestion so made by Mr. McNamara it was subsequently agreed that the Railroad Company "should have an opportunity to introduce evidence in support of the answer it had filed to the said complaint of the Fletcher Paper Company." *Record, p.* 14, *fol.* 23.

In other words, that statement was made before the agreement on which we rely was made.

The Supreme Court of Michigan, in the opinion of the Court by Justice McAlvay (*Record, pp.* 64-67, at *pp.* 71, 72) admits that such an agreement was made, and that it was reduced to writing. *See bottom of fol.* 116 and *top of fol.* 117.

The report of the Michigan Railroad Commission to the Circuit Court for the County of Wayne in Chancery of December 20, 1912, printed in the brief for the defendants in error at p. 10, was made when the case in that Court had so far progressed, that the testimony taken in the case had been transmitted to the Commission for its consideration.

The petition for a writ of mandamus had been filed August 9, 1912, and the Railroad Company had filed its answer thereto, so that the record in the mandamus case now under review, was made up long before the report of the Commission was made or the testimony was transmitted to it.

The mandamus case was argued in the Supreme Court of Michigan, January 14, 1913, and it was not decided until December 20, 1913.

The report of the Commission of December 20, 1912, and the accompanying correspondence, are not a part of the record in the mandamus case, but they are a part (but a very small part) of the record in the case still pending in the Circuit Court for the County of Wayne in Chancery.

That case has not yet reached the Supreme Court of Michigan and will not reach that Court until after it has been decided by the Wayne Circuit Court.

We think we have established the truth of three propositions:

1. That the additions to the record attempted to be made by the learned counsel for the defendants in error are as futile as they are ill-advised and unauthorized.

2. That the Michigan Railroad Commission did decide the merits of the case pending before it without giving the Railroad Company that notice and hearing necessary to the validity of its order of August 3, 1911.

3. That the Supreme Court of Michigan might have given the Railroad Company a full and fair hearing on the merits of the case, with the opportunity to put in evidence and make a full defense, but refusing to do so, granted the writ of mandamus, in plain violation of the due process of law clause of the Fourteenth Amendment.

We have a case, therefore, in which the Michigan Railroad Commission violated the due process clause, and the Supreme Court of Michigan did the very same thing.

I.

The objections to the jurisdiction of the Supreme Court of the United States in this case (*Brief for Defendants in Error, pp.* 16-24) are without foundation.

It is not true that the judgment of the Supreme Court of Michigan granting the writ of mandamus was interlocutory and not final; nor is it true that no federal question was decided adversely to plaintiff in error.

The order and judgment of the Supreme Court was that upon the filing of an indemnity bond by the Fletcher Paper Company,

"A peremptory writ of mandamus will issue out of and under the seal of this Court to compel it (the Detroit & Mackinac Railway Company) to make effective the order made by the Michigan Railroad Commission, dated August 3, 1911, and to put in force said order to re-lay the rails on the Tubbs Branch and to accept shipments offered to it on said branch by the Fletcher Paper Company, and to grant to said Fletcher Paper Company the same facilities heretofore granted by the said Detroit & Mackinac Railway Company to the Churchill Lumber Company, and to the Fletcher Paper Company, successors to the Churchill Lumber Company, and to such persons, firms, corporations, as have made shipments over said Tubbs Branch, sometimes called Martindale Spur." *Record, pp.* 77-78.

The judgment of the Court follows word for word the order of the Railroad Commission. *Record,* p. 7.

The Railroad Company, in its bill of complaint in the Circuit Court for the County of Wayne in Chancery, made the following allegations (*Record, pp.* 57, 60; *fol.* 101):

> "Your orator further shows that after said hearing, which was held at Lansing on the 24th of March, 1911, your orator wrote to the Michigan Railroad Commission, calling attention to the fact that it was understood at said hearing that if the Commission

desired to hear evidence on the part of the defendant, it would be given an opportunity to present its case to the Commission. That on the 7th day of April, 1911, in answer to said letter, the Michigan Railroad Commission, through its chairman, Mr. C. L. Glasgow, wrote to the general attorney of your orator as follows:

> 'We have your favor of the 4th calling attention to the conversation had with the writer relative to your appearance before the Commission in the case of the Fletcher Paper Company vs. The D. & M. Ry.; also reciting the conditions under which that matter was heard. We also note the attached letter from Mr. Hawks and wish to assure you that no advantage will be taken of the conditions as set forth by Mr. Hawks, wherein you were not permitted, or, rather, wherein it was indicated to you that it would not be necessary to have any witnesses for when the Commission comes to review this case if in their judgment they feel they have jurisdiction and desire to pass upon the facts presented you will be notified, and if it is your desire a further hearing will be granted for the purpose of allowing you to make such showing.
>
> 'We thank you for your complete and honest presentation of this question and can assure you that you will be fully protected as against any advantage that may be taken.'

"(4) Your orator further shows that without any further notice or hearing to your orator on, to-wit, the 3rd day of August, 1911, the Michigan Railroad Commission on said complaint made to it by the Fletcher Paper Company, as herein before set forth, issued its order against this defendant requiring it on or before the expiration of sixty days from the date of said order, 'To relay the rails removed by it from the so-called Tubbs Branch, or Martindale Spur,'" etc.

And the prayer of the bill was that the order of August 3, 1911, be declared null and void. *Record, p.* 62.

And the same facts were set up in the answer of the Railroad Company in response to the order to show cause why the writ of mandamus should not issue. The bill in the Wayne Circuit was annexed to that answer as Exhibit "C"

thereof, and the facts therein alleged were again alleged to be true. See XII. and XIII. paragraphs. *Record, pp.* 16-17.

The following is a quotation from the XII. paragraph:

> "This respondent further shows that the Railroad Commission filed an answer to said Bill of Complaint and thereupon the case being at issue, it was referred to an examiner to take the proofs in the case, and counsel for the parties have arranged to commence the taking of such proof at Alpena, on the 16th day of November, 1912; that said cause is still pending and undisposed of.
>
> This respondent further shows that until proofs are taken in said cause and the case is heard and submitted to the Circuit Court for the County of Wayne in Chancery, it will have had no opportunity to introduce evidence and to be heard on the facts on which the order of the Railroad Commission is based, or to disprove the allegations of the complaint of the Fletcher Paper Company to the Commission, Exhibit "A" of the petition of the relator, or to maintain and prove the allegations of its answer to said complaint, Exhibit "A" of this answer, pp. 9-15; that this respondent has been advised and respectfully submits that to grant the writ of mandamus prayed would be a violation of the due process of law and equal protections of the laws, clauses, of the Fourteenth Amendment of the Constitution of the United States."

The foregoing quotations from this record make it very plain that the Supreme Court of Michigan held that the order of the Michigan Railroad Commission of August 3, 1911, which was granted without notice and a hearing, was a valid order, and enforcible as such pending the case in the Wayne Circuit, notwithstanding it was absolutely void for want of notice and a hearing.

It appears that this conclusion was reached because the Railroad Company did not, between the granting of the order of August 3, 1911, and the filing of the bill in the Wayne Circuit September 2, 1911, apply to the Michigan Railroad Commission for leave to make a showing with proofs, and present in support of the application a "statement of the

nature of the testimony, it at that time desired to introduce," and "a statement of the merits which it could show by such proofs, and that in fact it expected and desired to put in further or other proofs, and exhibits other than are shown by the testimony returned in the record." *See Opinion of Supreme Court of Michigan, Record pp.* 64, 72, *fol.* 117; *reported* 178 *Mich.,* 230, 241-242, *and quoted in our first brief at p.* 31.

The ruling so made by the Supreme Court of Michigan is directly contrary to the opinion of the Supreme Court of the United States in the very recent case of *Coe vs. Armour Fertilizer Works,* 237 *U. S.,* 413, 424-425.

We respectfully submit:

1. That the mandamus case is a distinct and separate controversy which was finally decided by the Supreme Court of Michigan when it granted the writ.

2. That in granting the mandamus the Supreme Court of Michigan necessarily, and expressly, overruled the objection of the Detroit & Mackinac Railway Company, that the order of August 3, 1911, was void for want of that notice and hearing required by due process of law, and did decide that federal question adversely to the plaintiff in error.

The case is clearly within the jurisdiction conferred by Sec. 237 of the Judicial Code.

If these views are sustained by this Court, the judgment of the Supreme Court of Michigan granting the writ of mandamus will be reversed, and it will not be necessary to determine any of the other questions in the case.

If not sustained, the other questions presented by this record will need to be determined; and we will embrace the opportunity of making some additional observations thereon.

II.

Counsel for plaintiff in error contend that even if the Michigan Railroad Commission had given a full and fair hearing, yet it was not competent for the Supreme Court of Michigan to grant a mandamus to put the order of the Commission into full force and effect while the case in the Circuit Court for the County of Wayne in Chancery was still pending and undecided.

The Michigan Statute not only provided for notice and a full hearing before the Railroad Commission, but also that the contest there carried on could be removed to the proper Circuit Court by a bill in equity; that the additional testimony there taken should be transmitted to the Commission, and a report to the Court had thereon.

In that way the carrier concerned is given a judicial hearing before a Court of competent jurisdiction.

Until that hearing has been had the requirement of due process of law has not been fully complied with.

This does not belong to that class of cases in which the decisions and orders of executive or administrative officers are to be regarded as conclusive and final, if within their jurisdiction.

There must be an opportunity for a judicial hearing before an order of the Interstate Commerce Commission, or of a State railroad or corporation commission can be given operative effect.

The Michigan Act contains this provision, Sec. 25:

> "All rates, fares, charges, classifications and joint rates fixed by the Commission and all regulations, practices and services prescribed by the Commission shall be in force and shall be prima facie, lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of Sec. 26 of this Act, or until changed or modified by the Commission as provided for in Sec. 24 of this Act."

The act does not give the commission any power to issue process for the enforcement of its orders, or any power to punish contempts for violations or refusals to obey its orders.

The enforcement of the orders of the commission is placed in the hands of the judiciary by Sec. 47 of the act.

> "In addition to all other remedies provided by this act for the prevention and punishment of any and all violations hereof and of all orders of the commission, the commission, and likewise any person, firm or corporation interested, may compel compliance with the provisions of this act and with the orders of the com mission by proceedings in mandamus, injunction, or other appropriate civil remedies."

This section was designed to secure the constitutional right to a full judicial hearing in the courts, before, making the orders of the commission actually operative; and section 25 simply made the orders of the commission prima facie lawful and reasonable as evidence in the subsequent legal proceedings.

We find no fault with the statute. What we object to is the action of the Supreme Court of Michigan in ignoring its power, under the statute, and in refusing to give the railroad company that full and fair hearing required not only by the statute, but also by the due process clause of the Fourteenth Amendment.

The railroad company was entitled to sustain with evidence, proofs and arguments, the allegations contained in its answer in response to the order to show cause why the mandamus should not be granted.

III.

The next question which may be reached by the court in this case is whether it does not affirmatively appear by the complaint of the Fletcher Paper Company to the Michigan Railroad Commission, the answer thereto of the Detroit and Mackinac Railway Company, the testimony taken before the railroad commission, the petition for the writ of mandamus, and the answer of the railroad company, that the Tubbs Branch was a mere private convenience, resting in private contract, and not subject to governmental control, and was ordered restored for the private use of the Fletcher Paper Company.

We have covered this question in our first brief, but wish to again call attention to some of the more significant facts appearing on the face of this record, which show the inherent weakness of the case of the Fletcher Paper Company.

1. The complaint of the Fletcher Paper Company to the Michigan Railroad Commission admits that the Tubbs Branch was built by the Churchill Lumber Company, which "provided the right of way, constructed the grade and placed ties belonging to them on the branch," "that the railway laid the steel on said branch which steel they now own," and that the branch was operated for the Churchill Lumber Company and for two other companies, viz: The Fletcher Paper Company and the Lobdell-Churchill Company. (*Record, p.* 5).

2. The answer of the railway company to the complaint of the Fletcher Paper Company makes it still more clear and certain that the Tubbs Branch was owned and controlled by the Churchill Lumber Company as its private property, and that it never became a part of the statutory and public railroad of the Detroit and Mackinac Railway Company, and that the Churchill Lumber Company, June 8th, 1910, requested the railroad company in writing to remove its rails from the Tubbs Branch. *Record, pp.* 20, 21.

It further appears by the answer that on the 12th day of September, 1910, the railroad company sent a letter to the Fletcher Paper Company offering to restore the branch on terms to be agreed upon, and the Fletcher Paper Company has never answered the letter. *Record, p.* 22.

3. The testimony before the Michigan Railroad Commission brought out some significant explanatory facts.

Frank W. Fletcher, the President of the Fletcher Paper Company was sworn as the principal witness for that company. He testified that the Churchill Lumber Company had incurred an expense of about $9,000 in doing the grading and furnishing the ties for the Tubbs Branch. He further testified the Churchill Lumber Company had finished their work and removed all their timber during the winter of 1909-1910, and

> "notified the Detroit & Mackinac Railroad by writing to remove their rails from this right of way. The D. & M. Railroad did not remove their rails, and continued to operate the spur. There was left there some forty or fifty million feet of timber, owned by the Lobdell-Churchill Company of Onaway and the Fletcher Paper Company; the Fletcher Paper Company owned some 21,000,000 feet or better."
>
> "To get this timber out it was necessary that we have railroad communication, and the road already built was the most convenient method of getting it out."
>
> "After some negotiations with the Churchill Lumber Company they agreed to transfer their interest in that roadbed to the Fletcher Paper Company for the sum of $4,000, the transfer to run for a length of time such as was necessary to remove all the timber tributary to this right of way. I want to draw a point there; it isn't only until the Fletcher paper timber is removed, but all timber tributary to that right of way."
>
> "The Fletcher Paper Company had been taking out timber over this spur during the years 1908, 1909 and 1910, the three years previous to this, *when the roadbed was controlled by the Churchill Lumber Company.*
>
> "The custom is, that lumbermen wishing their timber taken out have got to furnish the roadbed, grade and ties. Therefore it became necessary for the Fletcher Paper Company to acquire this roadbed, that the Fletcher Paper Company could use it in taking out timber, and for that purpose right was acquired from the Churchill Lumber Company." *Record, pp.* 33, 34.

Further on Mr. Fletcher admits that he received the letter of Mr. Hawks, Vice-President and General Manager of the Railroad Company, offering to restore the Tubbs Branch if terms could be agreed upon. *Record, p.* 35, *fol.* 59.

He testified:

> "I will state that when this branch was taken up, I had no notification of it, until a letter written by Mr. Hawks dated the 12th of September, the rails were taken up on the 9th."

Mr. Fletcher also admitted that he never answered Mr. Hawks' letter. *Record, p.* 47, *fol.* 77.

4. The petition by the Michigan Railroad Commission for the writ of mandamus, in its X paragraph states that the commission had been informed by the representatives of the Fletcher Paper Company of an offer it had made to the railroad company for a restoration of the Tubbs Branch and the resumption of the transportation of the logs of the Fletcher Paper Company,

> "at freight rates established or to be established by said railroad company, *as modified by this commission, if the said order of the commission is reversed by the Wayne Circuit Court or by the Supreme Court of the State.*"

Previous to the filing, August 9, 1912, of the petition for a mandamus, the Supreme Court of Michigan, July 22, 1912, had affirmed an order of the Michigan Railroad Commission, reducing the rates of the railroad company for hauling logs from logging branches. 171 *Mich.*, 335.

Hence the alleged offer was to pay the rates fixed by the commission, and not such as might be agreed upon; and this offer was coupled with the condition that the order of August 3, 1911, was reversed by the Wayne Circuit Court or by the state Supreme Court.

5. The answer of the railroad company to the said X paragraph of the petition for mandamus is in the concluding

part of the XI paragraph of the answer, wherein it is said. *Record, p.* 16, *fol.* 26:

> "That this respondent is ready and willing to enter into a reasonable private contract with the Fletcher Paper Company for the restoration of said Tubbs Branch. This respondent respectfully submits that the terms to be agreed upon are a matter of private contract and that the Michigan Railroad Commission has no jurisdiction of the same."

We tried to review the decision of the Supreme Court of Michigan, 171 Mich., 335, in the Federal Courts, but were unable to do so. *Detroit and Mackinac Railway Company vs. Michigan Railroad Commission,* 235 *U. S.,* 402.

That case did not involve any logging branch which had been abandoned by the party by and for whom it was built, and who had control of it when it was in use, and had directed the railroad company to remove its rails and ties from the right of way.

IV.

James McNamara, the general counsel of the Detroit and Mackinac Railway Company, was the only witness, before the railroad commission, for that company. He gave full information about the proceedings in the Circuit Court for the County of Alpena in Chancery; produced certified copies of the bill of complaint of the Fletcher Paper Company, the answer of the Detroit and Mackinac Railway Company, and all the other papers in the case, including the opinion of the Court, Hon. Frank Emerick, Circuit Judge, holding the Tubbs Branch to be private and not public, and dismissing the bill of complaint: these papers consisted of some thirteen exhibits which were introduced in evidence and the contents of which were stated by the witness.

Incidentally Mr. McNamara stated some of the evidence that was introduced in the Alpena Circuit at the hearing November 22nd, 1910, for the purpose of showing that the whole controversy had been litigated in that case. Judge Emerick's opinion had been filed March 20th, 1911, only four days prior to the hearing before the commission.

The decree dismissing the bill without prejudice to a proceeding before the railroad commission was not settled and signed until some time afterwards. It is not a part of the evidence introduced before the railroad commission and is the decree mentioned in the letter of the commission to Mr. McNamara of June 13, 1911, printed in the brief for defendants in error at p. 11.

The evidence in the present record that the formal decree dismissing the bill did so without prejudice to proceedings before the railroad commission is found in the statement to that effect in the opinion of Commissioner Hemans printed in full in the opinion of the Supreme Court of Michigan, and wherein he says, "The decree in the chancery case had not at that time been entered and has subsequently been added to this record." *Record, p.* 68.

We refer to this for the purpose of showing that at the time of the hearing before the commission, March 24th, 1911,

the case in the Alpena Circuit was more than a prior suit pending, as it had become a final adjudication. Judge Emerick's opinion concluded with these words: "I do not think the complainant is entitled to the relief prayed for in its bill of complaint, which therefore, will be dismissed." *Record, p.* 64.

It was after the hearing before the commission, and counsel for the Fletcher Paper Company had become aware of the fact that the case in the Alpena Circuit was a bar to any further litigation, that they induced Judge Emerick in the formal decree to dismiss the bill without prejudice.

These facts add emphasis to our contention that the only question submitted to the railroad commission at the hearing March 24, 1911, was whether the case in the Alpena Circuit was not a bar.

It cannot be legally possible that when such a question is submitted to any tribunal, with the distinct understanding and agreement that if the plea in bar is overruled, the defendant will be notified and be given an opportunity to make a full defense on the merits, that the tribunal without such notice and oportunity can constitutionally proceed to a final decree or judgment.

V.

The decision of the Supreme Court of Michigan under review 178 *Mich.*, 230, was made December 20th, 1913. The record in the case was filed in this court Feb. 10th, 1914.

When counsel for the plaintiff in error prepared and filed their brief in the case, the decision of this court in *Coe vs. Armour Fertilizer Works*, 237 *U. S.*, 413, *decided May 3rd*, 1915, had not reached them.

We therefore beg leave to make a comparison.

The Supreme Court of Michigan, 178 Mich., 241-2, said:

> "Respondent contends that the instant case ought not to be considered and passed upon by this court, for the reason that it had no opportunity to present its proofs at the hearing before the railroad commission, and claims that on said hearing it relied upon its contention that the decree of the Alpena Circuit Court in Chancery dismissing the bill of complaint of the Fletcher Paper Company against respondent was *res adjudicata* and therefore a bar to the proceedings before the railroad commission, and that it was understood at the time, and by correspondence later, between it and the said commission, that, if that question was decided adversely to it, opportunity would be given to introduce evidence in this proceeding, should it so desire, and that it received no such notice; that the first knowledge it had of the decision by the commission was the service upon it of a copy of the order of August 3rd.
>
> "The record indicates that such an understanding was had; but it is denied in the brief of counsel for petitioner that no notice or opportunity was given to the respondent to furnish proofs in the case, *and no such claim appears to have been made to the commission after the order was promulgated and before the bill to review the order was filed.* The respondent at no time has presented any *statement of the nature of the testimony* it at that time desired to introduce, or

any *statement of merits which it could show by such proofs*, or that *in fact it expected and desired to put in further or other proofs* and exhibits than are shown by the testimony returned in the record.

"Further, the answer of respondent admits all of the material facts charged against it in the petition upon which petitioner relies for the relief asked of the railroad commission. Admitting the truth of its contention, it is apparent that *no injury to defendant has been done in the neglect to notify it according to agreement.*"

The Supreme Court of the United States, 237 *U. S.*, 424-5, by Mr. Justice Pitney, said:

"If a person against whom execution is thus issued as for an unpaid stock subscription does not happen to receive notice, extra-officially, or receiving it makes no objection, his property is taken in satisfaction of the corporation's debt—manifestly without due process of law. But, it is said, plaintiff in error is not within that class; he in fact learned of the execution before his property was sold or even his possession was disturbed, and he had an opportunity for a hearing in the present proceeding as to all questions upon which his liability depended. The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff in error, and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate. To one who protests against the taking of his property without due process of law, *it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees vs. Watertown*, 19 *Wall.*, 107, 123.

"Nor can extra official or casual notice, or a *hearing granted as a matter of favor or discretion*, be deemed a substantial substitute for the due process of law that the constitution requires. In *Stuart vs. Palmer*, 74 *N. Y.*, 183, 188, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the Court said: 'It is not enough that the owners may by chance have notice, or *that they may as a matter of favor have a hearing.* The law must

require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court. Thus, in *Security Trust Co. vs. Lexington*, 203 *U. S.*, 323, 333, the court, by Mr. Justice Peckham, said with respect to an assessment for back taxes: 'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question, is whether any notice is provided for by the statute (citing the New York case). So, in *Central of Georgia Ry. vs. Wright*, 207 *U. S.*, 127, 138, the Court said 'This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace.' 'The right of a citizen to due process of law must rest upon a basis more substantial *than favor or discretion.*' And in *Louis. & Nash. R. R. vs. Stock Yards Co.*, 212 *U. S.*, 132, 144, it was said: 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.' "

The rules of constitutional law so clearly laid down by this Court were violated by the Supreme Court of Michigan in that part of its opinion by the late Justice McAlvay, quoted above, in the following particulars:

1. In holding that it was incumbent on the railroad company before it could question the validity of the order of Aug. 3, 1911, to make an application to the railroad commission for leave to put in evidence and proofs and to make a defense of the case alleged against it.

2. In holding that such an application should be supported with a statement of the nature of the testimony the railroad company desired to introduce and a statement of the merits it could show by such proofs, and that it expected and desired to put in further or other proofs and exhibits than were shown by the testimony returned in the record, which con-

sisted of the testimony and exhibits introduced by the Fletcher Paper Company before the commission, without one word of contradictory, rebutting or explanatory evidence on the part of the railroad company.

3. In holding that the answer of the railroad company to the petition for the writ of mandamus admitted all of the material facts charged against it in that petition, when in truth the answer of the railroad company, denied and put in issue all the material facts.

4. In holding that in admitting the truth of its contention, it is apparent that no injury to defendant has been done in the neglect to notify it according to agreement.

5. In holding that a court has a discretionary power to refuse a hearing if in its judgment the defendant has no defense on the merits.

We respectfully submit that the judgment of the Supreme Court of Michigan granting the writ of mandamus should be reversed.

JAMES MCNAMARA,
FRED A. BAKER,
Counsel for Plaintiff in Error.

MAY 15 1915
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. [redacted] 68

DETROIT & MACKINAC RAILWAY COMPANY,
Plaintiff in Error

vs.

MICHIGAN RAILROAD COMMISSION AND FLETCHER PAPER COMPANY,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

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ALPENA, MICHIGAN
ALPENA NEWS PUBLISHING CO.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 360.

DETROIT & MACKINAC RAILWAY COMPANY,
Plaintiff in Error

vs.

MICHIGAN RAILROAD COMMISSION AND FLETCHER PAPER COMPANY,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

The statement of the case contained in the brief for plaintiff in error is of such a nature that no intelligent amendments can be made, so that it becomes necessary to entirely re-state the same.

The following statement of facts is largely taken from the opinion of the Michigan Supreme Court. (*Record pp.* 64-74.)

The writ of error in this case was issued to the Supreme Court of the State of Michigan upon the petition of the Detroit & Mackinac Railway Company, plaintiff in error, to review an order for a writ of mandamus made upon the application of the Michigan Railroad Commission to enforce an order made by it in the matter of the Fletcher Paper Company vs. the Detroit & Mackinac Railway Company, to

remain in force until the hearing and final determination of a cause now pending in the Circuit Court for Wayne County, in Chancery. (*Record p.* 64.)

The order was granted by the Michigan Railroad Commission on the petition of the Fletcher Paper Company of Alpena, the owner of logs and timber located along the line of what is known as the "Tubbs Branch" or "Martindale's Spar," and also the owner of the right of way, road bed and ties of this spur upon which the rails of the Company are laid, which is a logging branch of the Railroad Company, and which leaves the main line of the road at a station called Case and extends about five miles in a southerly direction from that point. (*Record pp.* 64, 65.)

The Fletcher Paper Company was engaged in delivering its logs along this branch road and shipping them to Alpena and other points on the Railroad Company's main line, and had a large amount of logs on the skidways along the track about one mile south from the main line ready for shipment, when the Railroad Company, without notice, took up about half a mile of its rails between the point where these logs were placed for loading and the main line, making it impossible to make any further shipment. (*Record p.* 65.)

The Railroad Company had operated its cars over this branch road for several years, transporting forest products of those having such along the branch for shipment, and had established schedules of rates for the same, which were duly filed with the Michigan Railroad Commission and published, and it operated this branch in the same manner as it operated many other branches of like character in that territory. The Railroad Company had notice of the Fletcher Paper Company's purchase of the right of way, road bed and ties of this branch from the Churchill Lumber Company, and afterwards for some time accepted and transported its logs from this branch according to schedule rates, without question. (*Record p.* 65.)

The Fletcher Paper Company, as soon as these rails were removed, filed its bill of complaint in the Circuit Court for the County of Alpena, in Chancery, for the purpose of re-

straining the Railroad Company from taking up its rails on this branch, and enjoining it to continue to operate this spur and haul out the Fletcher Paper Company's logs to and on its main line, and deliver them at its mills in Alpena county. (*Record p.* 65.)

The hearing of the issue joined in that case resulted in a decree dismissing the bill of complaint, but without prejudice to complainant to file its petition for relief with the Michigan Railroad Commission. (*Record p.* 65.)

Thereupon, the Fletcher Paper Company filed such petition with the Commission, which proceedings resulted in the granting of the order, the enforcement of which was sought in these mandamus proceedings. (*Record p.* 65.)

The opinion filed by the Michigan Railroad Commission states the following facts as having been disclosed by the complaint, answer and proofs in that matter before said Commission:

> "In the year 1905 the Churchill Lumber Company of Alpena, was the owner of a tract of timber lands, located in Presque Isle county, extending some five miles south of Case, a station on the main line of the Detroit & Mackinac Railway, the defendant herein. The owner, desiring to cut the timber, effected an arrangement with the defendant for railroad facilities, whereby the logs could be transported to Alpena. The contract which the parties made was a verbal one, providing in substance that the Churchill Lumber Company was to procure a right of way from the main line of the defendant Company to and through the timber lands. It was to grade the right of way and place the ties, and the defendant railway was to lay its rails thereon, and haul the forest products to the Lumber Company's place of manufacture. The agreement was fully consummated, and the road placed in operation during the year 1905. It has since been known as the 'Tubbs Branch' or 'Martindale Spur.'" (*Record pp.* 65, 66.)
>
> "It is important to note that the contract, or agree-

ment by which this particular branch road was constructed, was not exceptional in character, but both as to its form and provisions it was in keeping with the custom that was then and is still followed by the defendant, and by such other roads as engage in the transportation of forest products from the place of their severance to the places of manufacture. The magnitude of the lumbering operations, the great extent of timber tracts required to keep mills running, and economic operation have necessitated the construction of branches and spurs from the main line of such roads which traverse the timber sections into the adjacent forests. In many instances, such roads have been constructed by the lumber companies, are private in character, and are by the statutes creating this commission, excepted from its supervision or control. In other instances, as in this case, the branches have been both constructed and operated as appendages to main line. In such cases, as the evidence discloses, it is the custom of both the defendant and other railroads, in the section, to construct such spurs and branches into the timber tracts; the roads requiring the lumbermen to procure the right of way, to make the grade, and place the ties, while it places the rails and transports the woodsmen's harvest. These agreements between carrier and lumbermen have been quite generally left in parole, but the evidence offered by the defendant suggests nothing in modification of the claimed terms of such construction, except that it was the custom of the defendant before entering into such agreements to ascertain that the shipper had timber contiguous to a proprosed branch equal to at least two million feet per mile of road to be constructed." (*Record p.* 66.)

"The construction of the 'Tubbs Branch' so far as the defendant participated in it, and its subsequent operation by it, was, therefore, not an isolated case, but one of many of like character. The branch was ultimately constructed at a total length of something more than five miles. There were several proprietors owning timber contingnous to the branch. The Churchill Lumber Company, at whose instance the branch was constructed, owned from twelve to fourteen million feet.

There were other extensive holdings by the Lobdell & Churchill Company of Onaway; Embury-Martin of Cheboygan, while the complainant was the owner of more than twenty-one million feet, the transportation of which was to be facilitated by the branch in question." (*Record pp.* 66-67.)

"Between the establishment of the branch and the 8th of June, 1910, the Churchill Lumber Company cut and shipped out all of its timber contiguous to the Tubbs Branch, and on the date last mentioned apprised the defendant railway company of this fact, and requested the removal of the rails from the right of way. At this time the complainant and the Lobdell & Churchill Company had camps actively engaged in lumbering operations on their respective properties, and were shipping considerable quantities of logs over the branch, on the published tariffs of the defendant company." (*Record p.* 67.)

"The records of this department disclose that from the creation of the department, the defendant, through its public tariff files, has recognized this branch as a part of its general transportation system. (*See M. R. C. No.* 76, *M. R. C. No.* 250, *M. R. C. No.* 265, *M. R. C. No.* 274, *M. R. C. No.* 277, *M. R. C. No.* 279, *M. R. C. No.* 303.) The proofs disclose that under such tariffs, during a period of three years previous to the arising of the difficulty in question, the complainant offered and had transported over the Tubbs Branch to Alpena, logs to the extent of one million, three hundred thousand feet, while other extensive shipments were likewise made by the Lobdell & Churchill Company, and the Embury-Martin Company." (*Record p.* 67.)

"During the year 1908, forest fires killed between five and six million feet of timber belonging to complainant adjacent to the branch in question, and in the winter of 1909 and 1910, complainant began preparation for the cutting of this and other portions of the tract. Notwithstanding the notice of the Churchill Lumber Company of June 8th, above referred to, the defendant continued to transport the logs of complainant, and on August 3, 1910, the complainant acquired

from the Churchill Lumber Company for a consideration of four thousand dollars, all the right of the latter concern to the right of way and ties of the Tubbs Branch, so that so far as the physical property of the road was concerned, the complainant thereafter stood in the same relation to it that the Churchill Lumber Company had occupied, and in the same relation to it that all other companies stand to railroad branches for which they have furnished the right of way and ties, and the railroad company have furnished the rails. The Churchill Lumber Company at once, upon effecting the sale to complainant, by letter apprised defendant of the fact of such sale, and requested that the rails be not removed. The defendant company thereafter continued to accept shipments from complainant over the branch until the 9th day of September following. Between Aug. 3 and Sept. 9th, more than one hundred thousand feet of logs being transported. On the latter date, the defendant, without notice to complainant, took up about one-half mile of rail from the branch, beginning about one-half mile from the main line, and extending nearly to the skidway upon which the complainant had at the time approximately one hundred and forty-five thousand feet of logs skidded and ready for shipment, while three hundred and seventy-five thousand feet more were upon the rollways in the adjacent forest. On the very forenoon of the day the rails were torn up shipments were made for complainant under tariffs that were then and that continued thereafter in force. The complainant thereafter made a formal request that cars be placed and his shipments accepted. With this request the defendant refused to comply, leaving the rails piled by the right of way, and insisting that the tariff applicable to the branch had been cancelled by eliminating the same from the station list. As under the law, tariffs cannot be cancelled except upon notice to this commission, there is no force to this contention." (*Record pp.* 67-68.)

"Upon being apprised of the action of the defendant in removing the section of rail from the branch, the complainant filed a bill of complaint against defendant in the Circuit Court for the County of Alpena,

in Chancery. The bill sought to enjoin the defendant from removing further rails from the branch, and to compel it to replace those already removed, and to accept the shipments offered by complainant. While the above case was pending, complaint was filed with this commission. At the hearing the defendant offered the record of the proceedings in the Alpena Circuit Court in Chancery as a bar to the proceedings herein. The decree in this chancery case had not at that time been entered, and has subsequently been added to this record. The decree dismisses the bill of complaint, and provides in terms that it is 'without prejudice to complainant to file its petition for relief with the Michigan Railroad Commission.' * * *'' (*Record p.* 68.)

"Section 22, of Act No. 300 of the Public Acts of 1909, being an act which among other things defines the powers and duties of the Michigan Railroad Commission, provides:

" 'Upon complaint in writing of any person, firm or corporation or association, or of any mercantile, agricultural or manufacturing society, or of any body politic or municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property or any service in connection therewith, is in any respect discriminatory, or that any service is inadequate, the commission shall notify the common carrier complained of—' (*Record p.* 69.)

"After providing for hearing and investigation, the section further provides:

" 'If, upon such investigation, the rate or rates, joint rate or rates, charges or classifications, regulations, practice or service complained of shall be found to be unreasonable, inadequate or unjustly discriminatory, the commission shall have power to and it shall determine and by order fix and order substituted therefor, such rate or rates, joint rate or rates, fares and charges, as is or are just and reasonable, and which

shall be the maximum to be charged in the future, and such classifications, regulation, practice or service as is or are just, reasonable and adequate, and which shall be imposed and followed or service rendered in future in lieu of that found to be unreasonable, inadequate or unjustly discriminatory, and in either case the commission shall make an order that the common carrier cease and desist from such violation and shall conform to the regulation and practice so prescribed.' " (*Record p.* 69.)

The hearing of the petition of the Fletcher Paper Company, before the Railroad Commission, was had March 24, 1911. The order in question was made August 3, 1911. It was duly served on the Railroad Company August 8, 1911. (*Exhibit B, Record p.* 7, *and Exhibit D, Record p.* 13.)

On September 2, 1911, the Railroad Company filed its bill of complaint in the Circuit Court for the County of Wayne, in Chancery, to review, vacate and annul said order, which cause was pending at the time this mandamus proceeding was instituted, and is still pending in said court. (*Bill of complaint, Record pp.* 57-62; *Opinion, Record p.* 71.)

The Railroad Company contended before the Supreme Court of Michigan that the Michigan Railroad Commission's application for mandamus ought not to be considered and passed upon by said court for the reason that it had no opportunity to present its proofs at the hearing before the railroad Commission, and claimed that on said hearing it relied upon its contention that the decree of the Alpena Circuit Court in Chancery, dismissing the bill of complaint of the Fletcher Paper Company against the Railroad Company was *res adjuticata*, and therefore a bar to the proceedings before the Railroad Commission, and that it was understood at the time and by correspondence later between it and the said Commission, that if that question was decided adversely to it, opportunity would be given to introduce evidence in that proceeding should it so desire, and that it received no such notice; that the first knowledge it had of the decision of the Commission was the service upon it of a copy of the order of August 3, 1911. (*Record pp.* 71, 72.)

It was a disputed question of fact before the Michigan Supreme Court as to whether the Railroad Company was given notice or opportunity to furnish proofs in the case before the Michigan Railroad Commission. The record does not show that such claim was made by the Railroad Company to the Commission after its order was promulgated and before the Railroad Company filed its bill to review the order of the Commission. Neither does the record show that the Railroad Company presented any statement of the nature of the testimony it at that time desired to introduce or any statement of merits which it could show by such proofs, or that in fact it expected and desired to put in further or other proofs and exhibits than are shown by the testimony returned in the record. (*Record p.* 72.)

At page 26 of the brief of plaintiff in error it is correctly stated:

> "The Michigan Act expressly authorizes the filing of the bill in the Circuit Court in Chancery to contest any order of the Railroad Commission on the ground that it is unlawful or unreasonable, and it requires any testimony taken in the cause to be transmitted back to the Commmission for its consideration, and a report to the Court."

This provision of the statute was complied with in this case. While the petition for mandamus was pending in the Supreme Court of Michigan, the parties to this appeal completed, (as they then announced themselves), the taking of their testimony in the case pending in the Wayne Circuit Court in Chancery, November 30, 1912, and this testimony was certified back to the Railroad Commission. The Railroad Commission reported to the Wayne Circuit Court in Chancery, December 20, 1912, as follows:

STATE OF MICHIGAN.

In the Circuit Court for the County of Wayne,
In Chancery:

DETROIT & MACKINAC RAILWAY COMPANY,
Complainant,

vs.

MICHIGAN RAILROAD COMMISSION,
Defendant, No. 39609.

AND FLETCHER PAPER COMPANY,
Intervening Defendant.

To the Circuit Court for the County of Wayne,
In Chancery:

A copy of the evidence taken in the above entitled cause having been transmitted to this defendant, the Michigan Railroad Commission, and received by it on the 14th day of December, 1912, under and pursuant to Section 26, Subdivision c, Act 300, Public Acts of 1909, for its consideration, as required by law, this defendant, the Michigan Railroad Commission, begs leave to report as follows:

(First.) This deefndant, the Michigan Railroad Commission, has carefully considered the testimony in said cause, a copy of which was transmitted to it as aforesaid.

(Second.) That after such careful consideration of said evidence, made by this defendant, the Michigan Railroad Commission, it is the opinion and judgment of this defendant, the Michigan Railroad Commission, that the order made by it, bearing date the 3d day of August, A. D. 1911, requiring the said Detroit & Mackinac Railway Company to relay the rails removed by it from the so-called Tubbs Branch, or Martindale's Spur, on or before the expiration of thirty days from the date of said order, and to accept the shipments offered to it on said branch by the Fletcher Paper Company, and to grant to said Company the same facilities theretofore

granted by the said Railway Company to the Churchill Lumber Company, etc., should not be rescinded, altered, amended or modified in any particular.

Dated, December 20, 1912.

Respectfully submitted,

MICHIGAN RAILROAD COMMISSION,—

By C. L. Glasgow, Chairman."

(See certified copy filed in the office of the Clerk of this Court.)

Also, after the hearing had before the Railroad Commission March 24, 1911, the following correspondence between the Railroad Commission and counsel for plaintiff in error, and between counsel for the Fletcher Paper Company and plaintiff in error, concerning further proceedings before the Commission was had:

EXHIBIT U.

"June 13, 1911.

MR. JAMES MCNAMARA, Gen'l Counsel,
Detroit & Mackinac Railway Co.,
Majestic Building, Detroit, Mich.

Dear Sir—While at Alpena, Mr. Clark, of the firm of Gillett & Clark, called attention to the case of the Fletcher Paper Company vs. Detroit & Mackinac Railway Company.

It was the suggestion of the Commission, that the case hardly needed re-argument, but that the Commission would be pleased to receive briefs from both sides, which Mr. Clark intimated would be agreeable to his firm. He also suggested that he would be pleased to add the decree of the Court to the record. It was suggested that this might be done by stipulation.

Will you please take the matter up with Messrs. Gillett & Clark and arrange for the filing of briefs and

such further matters as you wish to add to the record?

Respectfully yours,

MICHIGAN RAILROAD COMMISSION,

By Lawton T. Hemans, Commissioner."

Dic. H-K.

To the foregoing letter, Mr. McNamara, counsel for plaintiff in error, replied:

EXHIBIT A.

"DETROIT & MACKINAC RAILWAY COMPANY,

Detroit, Mich., July 3, 1911.

HON. LAWTON T. HEMANS,

Michigan Railroad Commission,

Lansing, Michigan.

My Dear Mr. Hemans:

Returning to the city this morning and in looking over some old correspondence, I find you letter with reference to the so-called Tubbs Branch case which is dated the 13th inst. Since receiving your letter I have had some conversations and correspondence with Messrs. Gillett & Clark, with reference to the subject matter therein contained. I have also received a copy of a voluminous brief filed by them, a stipulation and copies of several letters. I have examined the brief carefully and there is absolutely nothing in it to make me change the original opinion which I expressed to you in this case.

Judge Emerick, in his opinion, which I filed with you at the time of the hearing, absolutely disposed of every contention raised by the Fletcher Paper Co., and left it without any legal standing whatever before the Circuit Courts of this state. The fact that a short time ago Messrs. Gillett & Clark succeeded in getting Judge Emerick to sign a decree which contained the words, "without prejudice," etc., cuts no figure in the disposition of this case. Judge Emerick told them at that time that he could not see what good the insertion of those

words would be to them, but inasmuch as they insisted on having them written into the decree, he complied.

Mr. Fletcher cannot try his case in two forums. He is obliged to either choose the Michigan Railroad Commission or the Alpena Circuit; but he cannot try the same issue in both courts at the same time. His legal rights are no greater than ours. If we had been defeated before Judge Emerick, in this case, our only remedy would be an application to the Supreme Court to review the decision. We could not come before the Commission and ask them to review the decision of Judge Emerick, because you have no appellate jurisdiction. I find nothing in the statute that gives you the power to review the decision of the circuit courts of this state. On the other hand, the law specifically provides that the circuit courts of this state may review the decision of your Commission. Let us look at it in another light.

Judge Emerick having decided this case adversely to the contention of the Paper Company, and dismissed their bill of complaint, you are now asked to review and reverse the decision of Judge Emerick, I would have the right, under the statute, to remove your order, or decision, to two different places. I could take it to the Wayne Circuit Court in Chancery, the home office of the defendant, or to the Alpena Circuit Court before Judge Emerick. If I choose the latter course, nothing could be more ridiculous, from a legal standpoint, than the position the case would occupy. Judge Emerick would then have before him for review, a case in which he had already rendered a decision upon the same facts, the same issues and the same parties. Do you think, as a lawyer, that Judge Emerick would reverse himself upon the same facts upon which he had already rendered a decision?

On the other hand, if I removed the case to the Wayne Circuit, my position would be equally ridiculous. I would be asking a court of concurrent jurisdiction to review the decision of one of the circuit judges of this state. In other words I would be asking the Wayne Circuit Court to sit as a Supreme Court to re-

view the decision of Judge Emerick of the Alpena Circuit.

Mr. Fletcher's remedy was and is to apply to the Supreme Court of this state, if dissatisfied with the opinion of Judge Emerick dismissing the bill. That is what we would have been obliged to do had Judge Emerick held against us; and I contend and insist that Mr. Fletcher has no more legal rights or remedies under the law of this state, than we have. The proposition is so ridiculous that even the long brief, based upon a few words in a decree which the authors of the brief insisted upon Judge Emerick putting into it to save their faces before your Commission, utterly fails to give it a serious aspect.

I shall be glad to do anything I can to aid your Commission in this matter. If you want me to reply to the brief of Messrs. Gillett & Clark, I will gladly do so. All we ask is fair treatment, and that I am absolutely certain we shall receive. Mr. Fletcher can appeal the decision of Judge Emerick to the Supreme Court if he is not satisfied with it, and thus do exactly what *we* would have been obliged to do had the decision been against us.

It might strike the Commission as a little singular that Judge Emerick, who has lived in Alpena for 35 years and is absolutely familiar with every detail of the Tubbs Branch situation, should have decided the case against Mr. Fletcher if there was any equity in his bill of complaint. I would like to ask you, as a personal favor, to read the decision of Judge Emerick which I left with you, once more; and then read the decree and the words which Mr. Fletcher's attorneys induced Judge Emerick to insert therein. You will see how abortive are those words to give the complainant any legal standing after the sweeping decision made by Judge Emerick.

Thanking you for your many courtesies, and with best wishes, believe me,

Very sincerely yours,

JAMES MCNAMARA."

(See certified copies filed in the office of the Clerk of this Court.)

The answer of the Railroad Company to the petition of the Michigan Railroad Commission for the issuance of the writ of mandamus out of the Supreme Court of Michigan, includes the pleadings and testimony in the proceedings before the Railroad Commission, the bill of complaint filed by the Fletcher Paper Company in the Circuit Court for the county of Alpena, and the Railroad Company's answer thereto, the bill of complaint filed by the Railroad Company in the Wayne Circuit Court in Chancery, and also the opinion of the Alpena Circuit Judge. (*Record pp.* 13-18.)

In its opinion the Supreme Court of Michigan, referring to the questions decided in the mandamus proceedings, says:

> "We are not called upon to consider and determine the merits of the controversy between the Fletcher Paper Company and respondent, Railway Company, upon the order of August 3, 1911. Such questions are involved in the case now pending before the Circuit Court for the County of Wayne in Chancery, wherein the respondent Railway Company seeks to review, annul and set aside said order. The sole question before this Court in this proceeding is whether the order of the Railroad Commission shall take effect and become operative pending the hearing and determination of that chancery case." (*Record p.* 73.)

The Fletcher Paper Company before the Railroad Commission offered—and upon the hearing in the Supreme Court of Michigan, kept such offer good—to indemnify the Railroad Company for all costs and expenses incurred in relaying the track taken up by it, with interest, and to pay all rates that might be fixed or charged by the Railroad Company and approved by the Commission, in case the order was vacated and set aside by the Wayne Circuit Court in Chancery, or by the Supreme Court of Michigan, if an appeal was taken. (*Record, Opinion, p.* 74.)

In granting the writ of mandamus the Supreme Court of

Michigan made the furnishing by the Fletcher Paper Company of such an indemnifying bond in the penal sum of ten thousand dollars to the Detroit & Mackinac Railway Company a condition precedent to the issuance of the writ. (*Record p.* 74.)

Such a bond was executed by the Fletcher Paper Company with two good and sufficient sureties, December 31, 1913, and thereafter approved by and filed with the Clerk of the Supreme Court of Michigan, and forms a part of the record in this Court. (*Record pp.* 78-80.)

ARGUMENT.

Before discussing the questions raised by the brief of counsel for plaintiff in error, we insist that for the following reasons, this Honorable Court has not jurisdiction to entertain the appeal:

First. No final judgment or decree has been rendered by the Supreme Court of Michigan.

Second. No Federal question has been passed upon by the Supreme Court of Michigan.

FIRST.

(a.) The matter involved arises from an order of the Michigan Railroad Commission, as set forth in the foregoing statement of facts. After the entry of the order, plaintiff in error under the provisions of Act 300, P. A. 1909, filed its bill of complaint in the Wayne Circuit Court in Chancery, to review, vacate and annul said order. This suit, so involving the order of the Commission, is still pending.

No final or other decree has yet been entered in the Wayne Circuit Court in Chancery, and since an appeal would lie therefrom to the Michigan Supreme Court, no writ of error would lie to the highest court of the state until a final decree had been rendered therein.

In *Mower vs. Fletcher*, 114 *U. S.* 127 (29 *L. Ed.* 117), the Court held:

> "A judgment is final for the purposes of a writ of error to this court, which terminates the litigation be-

tween the parties on the merits of the case, so that if there should be an affirmance here, the Court below would have nothing to do but to execute the judgment it had already rendered."

Citing: *Bostwick vs. Brinkerhoff*, 106 *U. S.* 3, where the Court says:

"The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of the term as used in the acts of Congress giving this Court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the Court below would have nothing to do but to execute the judgment or decree it had already rendered."

Citing many cases.

Continuing, the Court says:

"It has not always been easy to decide when decrees in equity are final within the rule, and there may be some apparent conflict in the cases on the subject, but in the common law courts the question has never been a difficult one. If the judgment is not one that disposes of the whole case on its merits, it is not final. * * *"

See: *St. Clair Co. vs. Lovingston*, 18 *Wall.* 628.
Parcels vs. Johnson, 20 *Wall.* 653.

In dismissing the last case cited, the Court stated:

"Thus it is apparent that the parties have not as yet exhausted the power of the State Courts in the premises, and until that is done our power cannot be called into action. This court must be the last resort of litigants in State Courts."

In *Missouri & Kansas Interurban R. R. Co. vs. City of Olathe, Kansas*, 222 *U. S.* 185, in deciding to dismiss, the Court said:

"As it does not appear from the record that the judgment sought to be reviewed was one which finally determined the cause, this court is without jurisdiction."

Citing: *Miners' Bank vs. U. S.*, 5 *How.* 213;
McComb vs. Knox Co., 91 *U. S.* 1;
Great West Telegraph Co. vs. Burnham, 162 *U. S.* 339.

If a writ of error lies to the decision that mandamus issue out of the Michigan Supreme Court, putting into effect the Commission's order, pending the suit to review, vacate or annul such order, then another writ of error might issue to the final decree of the Michigan Supreme Court, should an adverse decree be entered at the Circuit and on appeal be affirmed in the highest court of the state.

In *Louisiana Nav. Co. vs. Oyster Com.*, 226 *U. S.* 99, the Court says:

> "This Court cannot be called upon to review the action of the state court by piecemeal, and even if the judgment does finally dispose of some elements of the controversy, this court will not review it."
> *Canter vs. Am. & Ocean Ins. Co.*, 3 *Pet.* 318.

Will anyone contend that the decision of this Court will end the controversy? Plaintiff in error does not ask that the character of the Tubbs Branch be determined. (*Plaintiff's Brief, p.* 48.)

(b.) Under Section 22 of Act 300, P. A. 1909, the Michigan Railroad Commission is given the power to make such an order as it did in this case, and provides that such order shall be effective within twenty days after service thereof.

In the making of the order, the Commission acted under the supervisory powers granted it by the legislature.

The Commission has authority to administer the laws passed by the legislature, and the functions and duties of such commissions are administrative or ministerial, and neither legislative, executive nor judicial.

> 2 *Elliott on Railroads* (2d *Ed.*) *par.* 675.
> *Reagan vs. Trust Co.*, 154 *U. S.* 362.
> *Railroad Commission cases*, 116 *U. S.*, 307.

Atlantic Coast Line R. Co. vs. Corporation Com'n., 206 *U. S.*, 1.

See:- *Michigan Central R. Co. vs. Michigan R. Com'n*, 160 *Mich.* 355-371, where the subject is discussed and many cases cited.

By the provisions of Act 300 P. A. 1909, the findings of the Commission are not conclusive, but have the effect of establishing prima facie, they being lawful and reasonable until found otherwise, or until changed or modified by the commission.

Michigan Railroad Commission vs. Michigan Central R. Co., 159 *Mich.*, 580.
Detroit & Mackinac R. Co., vs. Railroad Com'n, 171 *Mich.*, 335-346.

By the provisions of Section 26 of said Act 300, P. A. 1909, as amended, the railroad company may, by suit in the circuit court, in chancery, against the Commission, have the order with which it is dissatisfied, vacated, annuled and set aside. Plaintiff in error has such a suit pending and undetermined in the circut court for Wayne county in Chancery.

By the provisions of Section 47 of said Act, the Commission may compel compliance with its orders by proceedings in mandamus.

In *Michigan Railroad Commission vs. Michigan Central Railway Co.*, 159 *Mich.* 580, it was held:

> "That an order of the Railroad Commission is enforceable although a proceeding in equity to review it is pending."

In that case the bill in equity had been heard in the circuit court and dismissed, and the suit was pending in the Supreme Court of Michigan on appeal, at the time the mandamus case was decided.

The order here involved and which the Court enforced by the writ of mandamus, is that of the Commission, and is *administrative* in its nature. The law provides that the

Court shall aid the Commission when it applies to enforce the order pending a judicial determination in equity of the validity of the order.

Notwithstanding the mandamus proceedings to put the order in force, it still remains an act of the Commission, administrative in its character, subject to the decision of the Wayne Circuit Court in Chancery, or the final decree of the Michigan Supreme Court on appeal, to be set aside, vacated or annulled.

In the proceedings appealed from, the Supreme Court of Michigan did not undertake to decide the question whether the Commission's order should for any reason be set aside, vacated or anulled, and, therefore, did not render a final judgment or decree.

A writ of error will not issue to the order of a state court which is administrative or ministerial in its nature.

In *Hand vs. Hagood*, 131 *U. S.* 181, (26 *L. Ed.* 301), it was held that a writ of error will not issue to the decision or judgment of a state court, which is only a direction to transfer the possession of a railroad to the comptroller general of the state; nor, it seems, to an order of the court below made on a motion for a writ of restitution.

See: *Barton vs. Forsyth*, 5 *Wall.* 190.
Dredge vs. Forsyth, 2 *Black* 563.
Smith vs. Frabue, 9 *Peters* 4.
New York Security & Trust Co. vs. Illinois Transfer R. R. Co., (*C. C. A.*) 104 *Fed.* 710.

In *Capital Nat'l Bank vs. Cadiz Nat'l Bank*, 172 *U. S.* 425, it was held that the jurisdiction of the United States Supreme Court under Section 237 of the Judicial Code, must be strictly within the terms of the statute.

The defendants in error respectfully request that the appeal be dismissed and the order affirmed for the first reason given: That no final judgment has been rendered by the Supreme Court of Michigan.

SECOND.

The Federal questions, if there are any involved, have not been passed upon by the lower court. Until the state court has decided the Federal questions its decision is not reviewable in the Supreme Court on writ of error.

Rogers vs. Clark Iron Co., 217 *U. S.* 589.
Santa Cruz County vs. Santa Cruz R. Co., 111 *U. S.* 361.
Southern R. Co. vs. Carson, 194 *U. S.* 136.
(48 *L. Ed.* 907.)
Christ Church vs. Philadelphia County, 20 *How.* 26.
(15 *L. Ed.* 802.)

The things necessary to appear on the record in the case in order to give the United States Supreme Court jurisdiction under Section 237 of the Judicial Code of appeals from the highest court of a state, are six in number, the fourth of which is that the Federal question "was in fact raised and decided" by the state court.

Armstrong vs. Treasurer of Athens Co., 16 *Pet.* 281.
Smith vs. Hunter, 7 *How.* 737-743.

In the latter case, the Court held:

> "That to give this court jurisdiction, two things should have concurred and be apparent on the record: First, that some of the questions stated in the section did arise in the court below; and, secondly, that a decision was actually made thereon by the same court, in the manner required by the section. That if both these do not appear on the record the appellate jurisdiction fails. It is not sufficient to show that such a question might have occurred, or that such a decision might have been made in the court below. It must be demonstrable that they did exist, and were decided."

Citing: *Crowell vs. Randall*, 10 *Pet.* 392.
McKinney vs. Carrol, 12 *Pet.* 66.

In the last case cited above the Court used the following language:

> "Two things must be apparent on the record to give

the Supreme Court jurisdiction under Section 25 of the Judicial Act. First, that some one of the questions stated in that section did arise in the state court; and, secondly, that a decision was actually made thereon in the manner required by the section."

Citing: *Coons vs. Gallaher*, 15 *Pet.* 18.
Fulton vs. McAffee, 16 *Pet.* 149.

In *Crowell vs. Randall*, 10 *Pet.* 368, 392, Mr. Justice Story stated in the opinion:

> "It must be apparent in the record, First, that some one of the questions stated in the section did arise in the court below; and, secondly, that a decision was actually made thereon by the same court in the manner required by the section."

The Supreme Court of Michigan in this proceeding has passed upon but one question: Whether mandamus would lie to put into force and effect the order of the Michigan Railroad Commission while the suit is pending in the Wayne Circuit Court in Chancery, to review, annul or vacate the same.

The Mchigan Railroad Commission act provides:

> "Sec. 47. In addition to all other remedies provided by this act for the prevention and punishment of any and all violations of the provisions hereof and of all orders of the Commission, the Commission, and likewise any person, firm or corporation interested may compel compliance with the provisions of this act and with the orders of the Commission, by proceedings in mandamus, injunction or by other appropriate civil remedies."

Under the authority of this section of the statute, the Michigan Supreme Court has held that mandamus would lie to put into effect the orders of the Commission, pending proceedings in equity to set them aside.

Mich. Railroad Commission vs. Mich. Central R. Co., 159 *Mich.* 580.
Mich. Railroad Commission vs. Detroit & Mackinac Ry. Co., 178 *Mich.* 230.

See: *City of Knoxville vs. Water Co.*, 212 *U. S.* 1.

In 26 *Cyc.* 372, under sub-head (j.), "Enforcing orders of Railroad Commission." The text upon the subject reads as follows:

> "Mandamus will lie to enforce valid orders of the Board of Railroad Commissioners or other like boards where by statute such orders are binding and the company is under legal duty to obey them. * * *"

Citing: *State vs. Atlantic Coast Line R. Co.*, 203 *U. S.* 256.
State vs. Seaboard Air Line R. Co., 203 *U. S.* 261.

In *Michigan Railroad Commission vs. Michigan Central Railroad Co.*, 159 *Mich.* 580, the court in the opinion filed, uses the following language:

> "The fact that the case is now in this Court upon an appeal from such decision does not, in our opinion, affect the question of the application of the statute. In fact, the prospect of a term of years elapsing before a final determination of the questions raised is a cogent reason why the legislature provided that the order should be effective during such delays."

We believe that the relator in the Court below made out such a clear legal right that it was entitled to have its order enforced by mandamus for the benefit of the complainant before the commission, defendant in error here, the Fletcher Paper Company.

State vs. Janesville, etc., *R. Co.*, 87 *Wis.* 72 (57 *N. W. R.* 970.)
Marbury vs. Madison, 1 *Cranch* 137.
Railroad Co. vs. Hall, 91 *U. S.* 343.
People vs. Chicago R. Co., 130 *Ill.* (22 *N. E.* 857.)
2 *Elliott on Railroads, Sec.* 698.

If there are any Federal questions, they must necessarily be involved in the *merits* of the whole case and will be decided when a full and complete hearing is had of the Chancery case now pending and undetermined in the Wayne Circuit Court.

Such questions were not involved in the application to the Michigan Supreme Court for a mandamus to put into effect the order pending the hearing at the circuit.

In granting the writ the Supreme Court stated in its opinion:

> "We are not called upon to consider and determine the merits of the controversy between the Fletcher Paper Company and respondent Railway Company upon the order of August 3, 1911. Such questions are involved in the case now pending before the circuit court for the county of Wayne, in chancery, wherein the respondent Railway Company seeks to review, annul and set aside the said order. The sole question before this Court in this proceeding is whether the order of the Railroad Commission shall take effect and become operative pending the hearing and determination of that chancery case." (*Record p.* 73.)

Even in the minority opinion written by Mr. Justice Ostrander, in which Mr. Justice Stone concurred, no such question was passed upon or decided, as will appear from the following quotation:

> "But whether the Michigan Railroad Commission has power under the statute to require respondent to continue to operate such a spur, or branch, against its will, and in face of its efforts to abandon it, is quite a different question. It is a question which we assume is presented in the pending chancery proceeding to set aside the order which in this proceeding is sought to be enforced. *It need not be answered now.*" (*Record p.* 76.)

The defendants in error respectfully request that the appeal be dismissed or the order affirmed for the second reason given: That no Federal question has been passed upon by the Supreme Court of Michigan.

Should the Court disagree with counsel for defendant in error, upon the question of jurisdiction, then it would become

necessary to consider the questions discussed by plaintiff in error, the first of which is stated as follows:

I

Whether the granting of a mandamus to compel the relaying of rails and resumption of service on the branch can be sustained as due process of law, while the case in the Wayne Circuit Court in Chancery was still pending and undetermined. (*Brief p.* 9.)

For several years prior to September 9, 1910, the plaintiff in error, a public railroad operating as a common carrier of freight, had under its published tariffs hauled logs for several lumber firms, including the Fletcher Paper Company, out over this branch, and over its main line, and delivered the same to the owners at Alpena, Cheboygan and Onaway. (*Records pp.* 33, 34, 26, 47. 48.)

On said day, and while the Fletcher Paper Company had 145,000 feet of logs banked at the track on this branch for transportation over the railway company's lines, and 375,000 feet of logs on rollways in the adjacent forest, without notice to the Paper Company, plaintiff in error took up half a mile of rails on this branch, starting half a mile from its junction with the main line. (*Record p.* 36.)

The failure to haul out these logs so banked for shipment to the Fletcher Paper Company's mills at Alpena, was found by the Commission to be an unwarranted discrimination by this railway common carrier against the Paper Company as a shipper of freight. (*Record pp.* 11, 12.)

The Michigan Railroad Commission, upon application and following a hearing, by order required the railroad to re-lay the rails. Pending a suit to review this action, application was made to the Supreme Court of Michigan for a mandamus to compel the re-laying of the removed rails and operation of the branch until the litigation was ended; provided, the Fletcher Paper Company indemnify the railroad for such expense, should the order of the Commission be annulled in the chancery suit. (*Record pp.* 1-5.)

So the question is limited to whether the requirement that

the railroad company resume its operation of the branch, as it had done previous to Sept. 9, 1910, amounts to the taking of its property without due process of law.

Plaintiff in error had in 1906 put in and afterwards operated this same branch for four or five years in taking out twelve million feet of logs for the Churchill Lumber Company. The railroad when taken up had left more than twenty-one million feet of logs that the Fletcher Paper Company owned and desired to be transported over this branch to Alpena. (*Record pp.* 35, 36.)

The hauling of the Churchill Lumber Company logs had been profitable to the railroad. The Paper Company's logs would be equally profitable to haul. (*Record p.* 44.) The Paper Company had indemnified the railroad for the cost of re-laying the rails. (*Record pp.* 78, 79, 80.) The railroad was to receive the freight rates required by its tariffs, or as fixed by the commission. (*Record p.* 80.) No loss could have been sustained in hauling out over this branch and its main line the logs of the paper company. Then, can it be contended under these circumstances, that the order of the Michigan Supreme Court for mandamus requiring the railroad to relay the rails, cease its discrimination and resume its former service on this branch amounts to the taking of the railroad's property without due process of law?

The above question is one that the Supreme Court of Michigan did not decide. In any event, the operation of the branch would only continue while plaintiff in error was testing out the validity of the Commission's order in its suit pending in Wayne Circuit Court in Chancery.

Unless it is made to appear that all of the logs would be hauled out of this branch while the railroad was testing the order of the Commission in the chancery suit, it cannot be said that the enforcement of the order by mandamus would be the granting of full relief to defendant in error, Fletcher Paper Company.

It took five years to haul out the Churchill Lumber Company's twelve or fourteen million feet of logs, and it would

require a much longer time to haul out the Paper Company's twenty-one million feet. (*Record pp.* 43, 44.)

II.

Counsel state the question under this head to be whether the alleged refusal of the Michigan Railroad Commission to give plaintiff in error further opportunity to be heard, and the refusal of the Michigan Supreme Court to allow the Railroad Company to dally longer in the mandamus case was a deprivation of property without due process of law, and a denial of the equal protection of the laws. (*Plaintiff's Brief, p.* 27.)

An examination of the facts in the case will disclose that there was no refusal of the Commission to allow the Railroad Company to be heard, but to the contrary, the Commission invited the Railroad Company to a further hearing. (*This Brief pp.* 11, 12, 13, 14.)

The Paper Company first sought to enjoin the further removal of rails, and the restoration of the one-half mile of track already removed from the branch, by suit in the Alpena Circuit Court in Chancery. Both the plaintiff in error and the Fletcher Paper Company put in all of their proofs in this suit, and the Court decided against the contention of the Paper Company and dismissed its bill of complaint, without prejudice to its rights to apply to the Michigan Railroad Commission for relief. (*Testimony and statements of Mr. McNamara, Record pp.* 49, 50, 51, 52.)

While the suit was still pending and undecided in the Alpena Circuit Court in Chancery, the Fletcher Paper Company made complaint to the Michigan Railroad Commission, the Railroad Company filed an answer to such complaint, and proofs were put in by both the Paper Company and the Railroad Company at a public hearing had before the Commission March 24, 1911. (*Fletcher Paper Company's application, Record pp.* 5-6; *the Railroad Company's answer, Record pp.* 19-23.)

The testimony taken on the hearing before the Commission, (*Record pp.* 32-57), shows that the Railroad Company

was represented by counsel (Mr. McNamara), who cross examined some of the Fletcher Paper Company's witnesses, put in documentary evidence, and was himself sworn and testified for the Railroad Company. (*Record pp* 46-49-57.)

Mr. McNamara, counsel for the railroad, was allowed upon such hearing before the Commission, to testify to all such parts as he desired to state of the testimony taken in the case in the Alpena Circuit Court in Chancery, and he also put in evidence all the pleadings and proceedings in said case and argued the matter before the Commission. (*Record pp.* 49-57.)

Counsel for plaintiff in error stated to the Commission:

> "If they arrive at the conclusion that my plea in bar is not well taken, they will notify me *if we desire to put in proofs, either to put it in or not to put it in. In other words, we should stand on our plea in bar, or stand on our demur in the plea.*" (*Record p.* 54.)

Mr. McNamara further stated at such hearing before the Commission and while putting in the testimony and proceedings had and taken in the Alpena Circuit:

> "We went up there and tried that case beforeJudge Emerick on the 22d of November, under the same facts presented before you today. * * *" (*Record p.* 52.)

After this hearing before the Commission, and the matter not receiving any more attention from the Railroad Company, the Commission on June 13, 1911, wrote Mr. McNamara the letter quoted in our statement of the case, which closes with the following language:

> "Will you please take this matter up with Messrs. Gillett & Clark, and arrange for the filing of briefs and such other matters as you may wish to add to the record?" (*This Brief p.* 11.)

Twenty days after, July 3, 1911, Mr. McNamara wrote to the Commission in answer to the above, the letter quoted in our statement of the case, in which he uses the following language:

"I have examined the brief carefully and there is absolutely nothing in it to make me change the original opinion which I expressed to you in this case." (*This Brief p.* 12.)

The Michigan Railroad Commission made its order August 3, 1911, and on September 2, 1911, plaintiff in error filed its bill in the Circuit Court for the County of Wayne in Chancery, under the authority of Section 26 of Act 300, P. A. of 1909, to vacate and set aside such order on the ground among other things that such regulation, practice or service required by such order is unreasonable. (*Record pp.* 57-62.)

The Raiload Company had full notice of the hearing before the Commission March 24, 1911, and appeared before that body, and from that time until August 3, 1911, made no application to the Commission for opportunity to put in further proofs or to further argue the matter; but to the contrary, when requested to file a brief or add to the record, declined so to do. (*Record pp.* 32-57; *this Brief pp.* 11-12.)

After the hearing upon the petition for mandamus in the Supreme Court of the State of Michigan, the Railroad Company put in its proofs in support of its bill of complaint filed in the Wayne Circuit Court in Chancery, to annul and set aside the order of the Commission, and thereafter under the provision of Sub-section "C" of Section 26, of Act 300 of the Public Acts of 1909, (page 723, quoted on page 16 of plaintiff in error brief), the testimony so taken was referred back to the Michigan Railroad Commission and that body reported the testimony back to the Wayne Circuit Court in Chancery, December 20, 1912, that its order should not be rescinded, altered, amended or modified in any particular. While such testimony was before said Commission, the plaintiff in error made no attempt to be heard upon the questions involved. (*Statement of case, this Brief pp.* 10, 11, 12.)

The suit of plaintiff in error had been pending in the Circuit Court for Wayne County, in Chancery, from September 2, 1911, to August 9, 1912, before the petition for mandamus was filed in the Supreme Court of Michigan, and the opinion granting the writ was not filed in said court until December 29, 1913. (*Record pp.* 5, 64-77.)

Plaintiff in error had completed its testimony in support of its bill of complaint filed in the Wayne Circuit Court in Chancery, November 30, 1912. This testimony had been certified by the Judge of the Wayne Circuit Court back to the Michigan Railroad Commission, December 14, 1912, and the report of the Commission above referred to, a copy of which appars in our statement of the case, was returned and filed in the Wayne Circuit Court December 20, 1912. (*This Brief pp.* 10, 11.)

The mandamus case was not submitted in the Supreme Court until January 14, 1913, so that the plaintiff in error could, had it so desired, placed in the record at length the testimony so taken and filed in the Wayne Circuit Court in Chancery. No attempt was made to call this testimony to the attention of the Supreme Court of Michigan or to point out in what particular it differed from the testimony taken before the Commission.

As the answer to this question presented in the brief of counsel for plaintiff in error is based solely upon the asserted fact that the Railroad Company had been deprived of a hearing before the Michigan Railroad Commission, if such claim be unfounded, then this question must be answered in the negative.

Upon this subject, the Supreme Court of Michigan in its opinion, stated in reference to the Railroad Company's contention before that court:

> "Respondent contends that the instant case ought not to be considered and passed upon by this court for the reason that it had no opportunity to present its proofs at the hearing before the Railroad Commission, and claims that on said hearing it relied upon its contention that the decree of the Alpena Circuit Court in Chancery, dismissing the bill of complaint of the Fletcher Paper Company against respondent was res adjudicata and therefore a bar to the proceedings before the Railroad Commission, and that it was understood at the time, and by correspondence later, between it and the said Commission, that if that question was decided adversely to it, opportunity

would be given to introduce evidence in this proceeding, should it so desire, and that it received no such notice; that the first knowledge it had of the decision by the Commission was the service upon it of a copy of the order of August 3d.

"The record indicates that such an undertaking was had, but it is denied in the brief of counsel for petitioner that no notice or opportunity was given to respondent to furnish proofs in the case, and no such claim appears to have been made to the Commission after the order was promulgated and before the bill to review the order was filed. The respondent at no time has presented any statement of the nature of the testimony it at that time desired to introduce, or any statement of merits which it could show by such proofs, or that in fact it expected and desired to put in further or other proofs and exhibits than are shown by the testimony returned in the record.

"Further, the answer of respondent admits all of the material facts charged against it in the petition upon which petitioner relies for the relief asked of the Railroad Commission. Admitting the truth of its contention, it is apparent that no injury to defendant has been done in the neglect to notify it according to agreement." (*Record pp.* 71-72.)

This is not a case where the Railroad Company had no notice of hearing, but one where not only notice was given, a hearing had and ample opportunity given for hearing and argument.

The Michigan Supreme Court has settled the propriety of the practice followed in this case. It has been expressly held that the statute provides a remedy by mandamus and that the legislature intended that, except under extraordinary circumstances, the orders of the Railroad Commission should be given effect pending litigation to test their validity.

"The fact that the case is now pending in this court upon an appeal, * * * does not, in our opinion, affect the question of the application of the statute. In fact, the prospect of a term of years elapsing before

> a final determination of the questions raised is, under the circumstances of this case, a cogent reason the legislature provided that the order should be effective during such delays."
>
> *Michigan Railroad Commission vs. Michigan Central Railroad Company*, 159 *Mich.* 580-583.

The case just cited gives literal effect to the provision of the statute that an order of the Commission shall "of its own force take effect and become operative twenty days after the service thereof. (*Sub-section "A," Section* 22, *Act* 300, *P. A.* 1909.) Also that "all regulations of the Commission shall be *in force* and shall be prima facie lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of Section twenty-six of this act, or until changed or modified by the Commission as provided for in Section twenty-four of this act." (*Sec.* 25, *Act* 300, *P. A.* 1909.) Under such circumstances, the writ of mandamus would issue out of the Supreme Court of Michigan almost as a matter of course, and the burden should have been upon the respondent to present to the court circumstances or reasons for not sustaining the order of the Commission.

The Supreme Court of Michigan, in referring to the order made by the Michigan Railroad Commission in the matter here involved, stated:

> "This order is prima facie not unreasonable; there is no question but that the legislative intent clearly expressed in this statute was that the orders of the Commission should be and continue in force during all subsequent proceedings until modified or set aside by the Commission or by the Courts." (*Record p.* 74.)

From the foregoing it will appear that the Supreme Court of Michigan did not pass upon the question whether the branch taken up was a part of the general railroad system in use by plaintiff in error as a common carrier ,or not. This question is one that is now involved in the case pending in the Wayne Circuit Court in Chancery, and is not here in

question. However, an examination of the brief for plaintiff in error under this head, should be sufficient to convince the Court that the operation of this branch by the Railroad Company was that of a common carrier of freight.

III.

We do not agree that any question of eminent domain is here involved. This order does not contemplate the building or putting in of a new line of railroad or branch, but to compel the relaying of a wrongfully removed old one.

The record discloses that plaintiff in error, four or five years before the rails were taken up, had been furnished the grade and ties by the Churchill Lumber Company and had put down the steel and ballasted this Tubbs Branch. That thereafter until September 9, 1910, the railroad had used the branch as a part of its general transportation system by filing public tariffs covering shipments of freight over the same and by hauling forest products for those firms and individuals desiring the service. Shipments of freight originating on this branch were handled by the railroad over its main line and system. By every act of the railroad this branch was held out to shippers and the general public as a part of its general railroad system. (*Record pp.* 33, 34, 36, 47, 48.)

June 8, 1910, the Churchill Lumber Co., having finished its lumbering on this branch, wrote the railroad requesting that it take up its rails from the branch. August 3, 1910, the defendant in error, Fletcher Paper Company, purchased the land or right of way occupied by the branch, and on August 9, 1910, the Churchill Lumber Co. notified the railroad of such sale to the Fletcher Paper Company and withdrew its request of June 8, 1910, to have the rails removed. All this took place while the railroad was operating the branch in connection with its main line, under its published public tariffs. (*Record pp.* 34, 36.)

The Fletcher Paper Company was lumbering in on this branch, the railroad continued hauling its logs out over it, and it had banked on the track of the branch for shipment over the railroad 145,000 feet of logs, when, without notice to the Commission, as required by law, the Railroad Company,

July 21, 1910, eliminated the Tubbs Branch from its *station list*, and September 9, 1910, took up one-half mile of the rails on the branch. Under this situation the right of way for maintenance of the branch was at the disposal of the railroad and actually occupied by its rails, when they were in part taken up as above stated. (*Record pp.* 34, 35, 36.)

Defendants in error contended before the Railroad Commission, and it so found, that this taking up of the rails from the branch by plaintiff in error was wrongful. (*Record pp.* 70, 76.) This finding of the Commission still stands, not having been vacated or set aside by the Court nor changed by the Commission. Then the premises upon which counsel for plaintiff in error base their rather elaborate argument to the effect that by compelling the railroad to relay the rails taken up from the branch and requiring the resumption of service thereon, would amount to the taking of private property for public use without the necessity therefor being first determined and just compensation therefor being first made or secured, would necessarily fail, and be inapplicable to the facts above stated.

Certainly, it will not be contended that should the plaintiff in error have taken up one-half mile of rails on its main line, that this provision of the constitution would have been violated by compelling the railroad to relay the rails and resume freight transportation. Neither would it be contended that it would be a denial of the right to the railroad of "equal protection of the laws" clause of the Fourteenth Amendment.

The "necessity for the public use" had been determined by the railroad with the acquiescence of or an agreement with the Churchill Lumber Company, and the right of way with the rails thereon had been dedicated to the public use by the railroad several years before the order of the Commission was made. The provisions of the state and Federal Constitutions should not be invoked to shield unwarranted and unlawful acts like that of this railroad in taking up the rails on this branch and discontinuing freight transportation thereon, thereby discriminating against the Fletcher Paper Company in leaving its product banked for shipment.

IV.

It is not plain why counsel discuss the question here mentioned, for after its statement, almost at once, they disavow any intention of asking the Court to pass upon, and determine whether the Tubbs Branch, if restored, will be public or private in its nature. (*Plaintiff's Brief p.* 47.

Quoting from counsel's brief (*p.* 48):

> "We do not submit these propositions for the purpose of having this court on this record decide that the Tubbs Branch as it originally existed or as it is to be restored, is private. * * *"

After which the question of the taking of private property for public use without compensation and its being forbidden by the due process of law clause is taken up and discussed, just as if this question was to be determined upon this record.

We have no intention of disputing the soundness of the law referred to, but we do say that counsel have misapprehended the questions decided by the Supreme Court of Michigan, and the facts upon which the writ of mandamus was granted.

The Michigan Railroad Commission found in substance that by use and treatment this Tubbs Branch had become a part of the plaintiff in error's general railroad system. (*Record p.* 67.) Under the act creating the Commission, (*Section* 25 *of Act* 300, *P. A.* 1909), this finding is made "prima facie lawful and reasonable until *finally found* otherwise in an action brought for the purpose * * *, or until changed or modified by the Commission." Such an action is now pending in the Wayne Circuit Court in Chancery. (*Record p.* 73.)

> *Detroit & Mackinac Ry. Co. vs. Michigan Railroad Commission,* 171 *Mich.* 335, 346.

Merely alleging the contrary, in its answer to the order to show cause issued out of the Supreme Court in the mandamus case, would not prove on the part of the plaintiff in error its claim to the alleged character of this branch or overturn

the prima facie correctness of the Commission's finding. Upon the record as it stood, it was clearly the duty of the state court to grant the writ.

We are not inclined to be critical of the acts of the railroad before the Commission, but we do believe that it would have added to the record there any fact it posessed tending to have proved the private character of the branch.

V.

Much that has been said under sub-division IV of the brief for defendants in error, applies here, at least that part referring to the finding of the Commission as to the public nature of the branch.

The findings of the Commission are prima facie lawful, and as the plaintiff in error does not even claim that such finding, that the branch was a part of the general railway system of this common carrier, has been overturned by either the courts or the Commission, no basis exists for repeating the argument.

The Michigan Railroad Commission found that:

> "The records of this department disclose that from the creation of the department, the defendant through its public tariff files, has recognized this branch as a part of its general transportation system." (*Record p.* 67.)

Reference is then made to the shipment of logs over the branch for various parties. All the facts in relation to the filing of public tariffs quoting rates on logs, and other kinds of freight over this branch and its main line by plaintiff in error, were known to the Commission and needed no further proof.

Since the above stated findings of the Commission had not been set aside by the Court or changed or modified by the Commission, and the statute provides that "regulations of the Commission shall be in force," it was the legal duty of the state Supreme Court to compel the Railroad Company to relay the rails and resume service over this branch,

during the pendency of the chancery suit. (*Sec.* 25, *Act* 300, *P. A.* 1909.)

We respectfully submit, (1), that the writ of error issued to the State Supreme Court should be dismissed; (2), that in the event that this Court decides to retain jurisdiction, that the order of the Michigan Supreme Court granting the writ of mandamus should be affirmed.

Respectfully submitted,

GRANT FELLOWS,

I. S. CANFIELD,

Counsel for Defendants in Error.

Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 68.

DETROIT & MACKINAC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

MICHIGAN RAILROAD COMMISSION AND
FLETCHER PAPER COMPANY,
DEFENDANTS IN ERROR.

REPLY BRIEF FOR DEFENDANT IN ERROR MICHIGAN RAILROAD COMMISSION.

GRANT FELLOWS,
Attorney General of Michigan;
DAVID H. CROWLEY,
Assistant Attorney General of Michigan,
Counsel for Defendant in Error
Michigan Railroad Commission.

(24,053)

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REPLY BRIEF FOR DEFENDANT IN ERROR MICHIGAN RAILROAD COMMISSION.

Plaintiff in error contends that the Supreme Court of Michigan, in granting the mandamus in question, violated the provisions of the Fourteenth Amendment to the Constitution of the United States, in that the judgment of the court constituted a taking of the property of plaintiff in error without due process of law, and bases its contention in this respect, in the main, upon two grounds;

First. That the order of the Michigan Railroad Commission was made without notice to plaintiff in error and without an opportunity for hearing, and was consequently void.

Second. That even if the said order had been based upon a full and fair hearing, yet it was not competent for the Supreme Court of the State to grant a mandamus putting such order into full force and effect while the proceeding to review same was still pending in the Circuit Court for the County of Wayne, in chancery, and undecided.

We address ourselves, very briefly, with respect to these contentions in the order set forth.

I.

Plaintiff in error cites the case of Coe *vs.* Armour Fertilizer Works, 237 U. S., 413, and contends that the rule respecting notice and hearing there laid down is directly applicable to the instant case. From an examination of that case it appears that the controversy arose under a statute of the State of Florida allowing execution to issue against a stockholder of a corporation without notice or hearing after an execution upon a judgment against the corporation had been returned unsatisfied. Under the provisions of the statute the Fertilizer Company levied upon a parcel of land belonging to Coe, a stockholder, who then filed in the circuit court a petition to quash the execution as illegally issued, alleging that it had been issued without notice to him and amounted to the taking of his property without due process of law and that the statute permitting the same was repugnant to the "due process" and "equal protection" clauses of the Fourteenth Amendment. The matter finally reached the Supreme Court of Florida, where a judgment of the circuit court denying a motion to quash was affirmed. The case was then brought to this court upon writ of error, and the judgment of the Supreme Court of Florida was reversed, this court saying, at page 423:

> "But before a third party's property may be taken to pay that indebtedness upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription he is entitled, upon the most

> fundamental principles, to a day in court, and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself."

The facts in the case above cited are in no wise similar to those in the case at bar, and the principles applicable to those facts cannot be urged as controlling in the instant matter. In the Coe case there was no preliminary notice to the party to be charged; in the instant case such notice is not questioned. In the Coe case there was no hearing; in the instant matter there was at least one hearing. In the Coe case the plaintiff in error had no day in court; in this case plaintiff in error did. In the Coe case a judgment under which the levy was made was entered without any facts before the court justifying a finding of individual responsibility; in the instant matter all of the facts which had been presented in defense of the same issue before the Alpena Circuit Court, in chancery, were before the commission. No claim is made by plaintiff in error that the Railroad Commission had not in a proper manner acquired jurisdiction of the parties. The most that can be claimed is, that an opportunity was not afforded to put in more testimony than that offered at the hearing. When the matter was heard before the Railroad Commission counsel for plaintiff in error did not announce that further hearing was desired if the demurrer was overruled. Counsel at at that time stated, "they will notify me if we desire to put in proof, either to put it in or not to put it in" (Record, page 54). With reference to this the Supreme Court of Michigan, on the hearing for mandamus, found that plaintiff in error had been deprived of no substantial right nor denied an opportunity to be heard. The court said, with reference to this claim:

> "The record indicates that such an undertaking was had, but it is denied in the brief of counsel for petitioner that no notice or opportunity was given

to respondent to furnish proofs in the case, and no such claim appears to have been made to the commission after the order was promulgated and before the bill to review the order was filed. The respondent at no time has presented any statement of merits which it could show by such proofs, or that in fact it expected and desired to put in further or other proofs and exhibits than are shown by the testimony returned in the record.

"Further, the answer of respondent admits all of the material facts charged against it in the petition upon which petitioner relies for the relief asked of the Railroad Commission. Admitting the truth of its contention, it is apparent that no injury to defendant has been done in the neglect to notify it according to agreement" (Record, page 72).

Judge Cooley in his work on Constitutional Limitations states the rule to be that—

"When it is once made to appear that a court has jurisdiction both of the subject-matter and of the parties, the judgment which it pronounces must be held conclusive and binding upon the parties thereto and their privies, notwithstanding the court may have proceeded irregularly or erred in its application of the law to the case before it. It is a general rule that irregularities in the course of judicial proceedings do not render them void. An irregularity may be defined as the failure to observe that particular course of proceeding, which, conformable with the practice of the court, ought to have been observed in the case, and if a party claims to be aggrieved by this, he must apply to the court in which the suit is pending to set aside the proceeding or to give him such other redress as he thinks himself entitled to; or he must take steps to have the judgment reversed by removing the case for review to an appellant court, if any such there be. Wherever the question of the validity of the proceedings arises in any collateral suit, he will be held bound by them to the same extent as if in all respects the court had proceeded according to law. An irregularity cannot be taken advantage of collaterally; that is to say in any other

suit than that in which the irregularity occurs, or on appeal, or process in error therefrom."

Cooley Constitutional Limitations, 7th edition, pages 587-588.

White *vs.* Crow, 110 U. S., 183, involved a state of facts where, in a suit against a corporation, process was served in the State upon an agent who was a stockholder and authorized to receive service. He appeared and consented to judgment being entered against the corporation before the return date. "The service was regular." "The court therefore had jurisdiction of the parties. It had jurisdiction of the subject-matter and the judgment which it rendered was within the jurisdiction conferred upon it by law * * *. The law, therefore, when the judgment is questioned, presumes that the court was satisfied with the proof that * * * the agent had authority. * * * but * * * the question arises whether the rendition of the judgment before the time for filing defendant's answer had expired renders the judgment void? We are of the opinion that it does not; that its rendition was simply erroneous, nothing more. The court having jurisdiction to render the judgment, and having rendered it, the law, when the judgment is collaterally attacked, will make all presumption necessary to sustain it. * * * The defendant being in court was bound to take notice of its proceedings and might have corrected the error at any time during term. It did not move to set aside the judgment; it filed no answer. The presumption, therefore, which the law makes is either that it consented to a submission of the case before the time for answer expired or that it subsequently waived the error by not seeking to correct it."

Lent *vs.* Tillson, 140 U. S., 316:

This case involved a street-widening proceeding in the city of San Francisco. The notice and hearing was provided for by statute. A proceeding was provided whereby

parties could petition, etc. Complaint was made that the act was so administered that it resulted in depriving the plaintiffs of their property without due process of law. The court said:

> "But errors in the mere administration of the statute, not involving jurisdiction of the subject and the parties, could not justify this court in a re-examination of the judgment of the State Court, to hold that the State had deprived the plaintiffs of their property without due process of law."

The facts and conclusions of the above cases are not set out for the purpose of maintaining that the order in question of the Railroad Commission was being questioned in a collateral proceeding, although it cannot be claimed that the mandamus proceeding was a direct review of the order of the commission; but such facts and conclusions are set forth for the purpose of indicating that the order of the Michigan Railroad Commission could not, even if viewed from the standpoint of plaintiff in error, be considered void, as claimed by plaintiff in error (Reply Brief of Plaintiff in Error, page 10), and hence could not be within the rule laid down in Coe *vs.* Armour Fertilizer Works, cited and relied on by plaintiff in error.

The necessary rules of procedure, above referred to, namely, notice, hearing, etc., and the distinction between those errors that render a judgment void and those resulting simply in irregular procedure, have been pointed out many times by this court in reviewing judgment of State courts. The rules of procedure should be construed even more liberally when applied to the Michigan Railroad Commission, whose proceedings are administrative or ministerial and not judicial (Michigan Central Railroad Company *vs.* Michigan Railroad Commission, 160 Mich., 355). And, again, the findings of the said commission are not, under

the Michigan statutes, conclusive, but are only *prima facie* until modified by the commission or set aside by the court.

Michigan Railroad Commission *vs.* Michigan Central Railroad Company, 159 Mich., 580.

D. & M. Railroad Company *vs.* Railroad Commission, 171 Mich., 335-346.

The remedy of one aggrieved by the order of the commission is not by appeal, but by bill to review filed in any circuit court in chancery (Plaintiff in Error's Principal Brief, page 26). Neither is the order of the commission self-executing. It may only be enforced by the mandate of the court (Reply Brief for Plaintiff in Error, page 12).

The Supreme Court of Michigan held, after an examination of the facts, that—

> "No injury to defendant has been done in the neglect to notify it according to agreement,"

and that

> "the answer of respondent admits all of the material facts charged against it in the petition upon which petitioner relies for the relief asked of the Railroad Commission."
>
> **Record, page 72.**

II.

Counsel for plaintiff in error contends that by putting the order of the Railroad Commission into effect before a judicial determination of its validity on the facts the Supreme Court of Michigan deprived plaintiff in error of its property without due process of law, and reasons that, inasmuch as the proceedings before the commission are administrative in character, the requirement of due process of law has not been fully complied with until a hearing in court, with respect to an order made, has been held (Plaintiff in Error's Reply Brief, page 11).

We are unable to follow the reason of counsel wherein a distinction is attempted to be made between a hearing before a commission and one before a court. We admit that the Michigan statute permits and authorizes a judicial review of an order of the commission, and that questions in issue should not ordinarily be foreclosed until such review has been had, but in this respect the rule would be the same on appeal from the judgment of a lower court. The orders of the Michigan Railroad Commission, as before stated, are not self-executing. Hence there must be a judicial determination as to the validity of the order before the same may be put into effect. Plaintiff in error has not been foreclosed upon the facts in issue by the judgment of the Supreme Court of Michigan in the mandamus proceeding, for the reason that the Supreme Court of Michigan recognized the pendency of the case then pending in the Circuit Court of the County of Wayne, in chancery, and refused, for this reason, to consider or determine the merits of the controversy existing (Record, page 73), and issued the mandamus upon the record made in the mandamus proceeding.

As a general rule, mandamus will not lie where another suit involving the same subject-matter is pending, but this rule does not apply where the pending litigation will be ineffective or where irreparable loss or damage will result from delay. Thus it has been held that mandamus would lie to secure the right to sell, upon execution, land in the possession of a receiver, although a proceeding was pending to set the judgment aside, where otherwise the security of the judgment creditor would be destroyed.

> Petaluma Savings Bank *vs.* San Francisco Superior Court, 111 California, 488; 44 Pacific, 177.

In Southern Pac. Co. *vs.* Siemens, county treasurer (Supreme Court of Oregon), 150 Pac. Rep., 290, the plaintiff was the owner of a large amount of taxable real property in Klamath County and a small amount of personal property. The true amount of taxes to be collected for the year 1912

upon such personal property was $179.95. The decimal point was unintentionally omitted by the assessor, and the error was not noted by plaintiff, who consequently paid $17,995, less 3 per cent discount. A month later the error was noted and demand made for return of the difference. County had expended the money and so issued warrants for the amount of overpayment, namely, $17,280.45. Suit in equity to enjoin payment of warrants was then commenced in the Circuit Court for the County of Klamath by a certain individual, naming his defendants the collector, treasurer, and plaintiff, alleging that payment of warrants would increase the voluntary indebtedness of the county to an amount in excess of that permitted by the State constitution and that consequently the warrants were void. A similar suit was begun by another party in the United States District Court for the District of Oregon to restrain payment of the warrants. Plaintiff owed taxes for the year 1913 on its entire property, amounting to $23,193.14, and attempted to pay such taxes by tendering to the collector $12,793.24 cash and two of the warrants, amounting with interest to $10,400. The offer was refused. Upon petition of plaintiff mandamus was directed to the defendant, commanding him to accept the cash and warrants tendered or to show cause for refusal. Demurrer to the writ was overruled. Defendant filed plea in abatement, showing the pendency of the suit in equity, alleging that a determination of the suit in equity would be decisive of the controversy. Demurrer to this plea in abatement was sustained and an answer was then interposed, alleging, among other things, the pendency of the two suits. Demurrer to the answer was sustained, and defendant declining to further plead judgment was rendered commanding an acceptance of the cash and warrants. Appeal to the Supreme Court was then taken, and in affirming the judgment of the lower court the Supreme Court said, with reference to this matter:

> "The remaining assignment of error arises out of the ruling of the trial judge who held that the litigation pending in the Circuit Court for Klamath County and in the District Court of the United States for the District of Oregon did not necessarily abate mandamus proceeding. The suits in equity were prosecuted upon the theory that the warrants held by plaintiff and others are unconstitutional and void * * *. Decrees in the suits in equity declaring the validity of the warrants would afford some of the relief, but not all, sought by the writ of mandamus because the decrees would proceed no further than to determine the worth of the warrants. If the paper is void the county would be enjoined from paying. If the warrants are valid the decrees would so declare, but in such event plaintiff would still be obliged to call for the aid of a writ of mandamus if the County Treasurer should continue to refuse to accept the tendered warrants. All the relief sought by mandamus cannot be obtained in the suits in equity. There is also a difference in the character of the relief asked for. The suits will not result in a complete adjudication of the questions involved and consequently the instant case is not necessarily abated by the prior litigation."

In the case of State *ex rel.* Oshkosh, Algoma and Black Wolf Railroad Company *vs.* Burnell, Circuit Judge, 104 Wisconsin, 246, relator, a passenger-carrying corporation, condemned a strip of land for right-of-way purposes across the right of way of the Chicago & Northwestern Railway Company, who appealed from the order of the condemnation commissioners to the Circuit Court for Winnebago County and applied for and obtained an order restraining the petitioner from putting in the crossing until the appeal was heard. The restraining order required the giving of an undertaking in the sum of $5,000. Upon hearing, the C. & N. W. moved to dismiss the petition for jurisdictional reasons, and the motion was overruled. It then refused to put in testimony. Judgment dismissing the appeal and dis-

solving the injunctional order was rendered. The C. & N. W. then moved the court for a continuance of such order pending the appeal, and the same was granted upon an undertaking in the sum of $15,000 being furnished. The undertaking furnished was conditioned that should judgment or any part thereof be affirmed appellant should pay all costs and damages which might be awarded against it and all which the said O. A. & B. W. R. R. Co. might sustain by reason of a continuance of the injunctional order. O. A. & B. W. R. R. Co. then applied to the Circuit Court for an order fixing the sum and effect of an undertaking to be given by it to abide and perform any final judgment which should be rendered in favor of the C. & N. W. Rwy. Co. upon its appeal and for an order vacating and dissolving the injunctional order already entered. The court refused to vacate the injunctional order or to approve undertaking because of the grave character of the questions involved in the main case. Petitioner then moved for a writ of assistance, which was refused. Mandamus was then asked of the Supreme Court directing circuit judge to grant a writ of assistance to put relator in possession of right of way across C. & N. W. tracks. After stating view of the circuit judge with reference to questions in the main case the court said:

> "The questions here presented are quite important to the public at large as well as to the corporations themselves. The multiplication of grade crossings over important railway lines is not desirable. No urgent necessity appears why the crossing should be put in until the litigation is terminated and the right to a crossing finally determined. The C. & N. W. Rwy. Co. has given a sufficient undertaking to protect the petitioner from loss in case it should be finally determined that petitioner is entitled to a crossing. * * * We cannot say, upon the papers before us, that it is plain, that it was the duty of the court to award a writ of assistance, nor can we say that there is any emergency calling for immediate action, or that the remedy by appeal or writ of error is not

> entirely sufficient. The questions involved here deserve the careful consideration which they will receive upon hearing of the appeal upon the merits but cannot well receive upon a summary proceeding of this nature."

While the Supreme Court of Wisconsin, in the case last above cited, refused to grant the mandamus, it is apparent that the court recognized the law applicable to mandamus proceedings when arising during the pendency of other litigation involving the facts in issue. In the case at bar the Supreme Court of Michigan had before it a petition for mandamus, alleging great, if not irreparable, loss to petitioner, if the order of the commission was not summarily put into effect (Record, pages 3 and 4). It had before it a situation where the danger of loss was so great that the Fletcher Paper Company had offered to secure the D. & M. Rwy. Co. against loss by filing a bond sufficient in amount to cover the cost of relaying the branch (Record, page 3). The plaintiff in error, unlike the C. & N. W. Rwy. Co. in the Wisconsin case, had furnished no undertaking that would, in any way, save defendant in error from loss. The relief asked for by the Fletcher Paper Co. in the mandamus proceeding was not identical with that asked for in the petition to the Michigan Railroad Commission. In the latter it was requested that the plaintiff in error be required to relay the rail removed and operate the branch as part of its system. In the former it was requested that the railroad be compelled to put into effect the order of the commission until there had been a final determination of the controversy in the suit then pending.

The defendant in error was required to furnish a bond in the sum of $10,000 to protect the plaintiff in error from possible loss, and such bond was furnished. So that the exact situation before the Supreme Court of the State of Michigan in the mandamus proceeding was the danger of irreparable loss on one side, with no security to protect in case of such

loss, and on the other an offer by the petitioner to insure against loss if the order of the commission was made effective.

The Supreme Court of Michigan, in the case of Michigan Railroad Commission *vs.* Michigan Central Railway Co., 159 Mich., 580, had determined "that an order of the Railroad Commission is enforcible, although a proceeding in equity to review it is pending," and in that case, at page 580, used the following language:

> "The fact that the case is now in this court upon an appeal from such decision does not, in our opinion, affect the question of the application of the statute. In fact, the prospect of a term of years elapsing before a final determination of the questions raised is a cogent reason why the legislature provided that the order should be effective during such delays."

Act 300 of the Public Acts of 1909 of Michigan, under which the Michigan Railroad Commission was organized and under which the Commission proceeded in the instant matter, provides:

> "Sec. 25. All * * * regulations, practices and services prescribed by the commission shall be in force and shall be *prima facie*, lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of section 26 of this act or until changed or modified by the commission as provided for in section 24 of this act."

Again, sec. 22-A:

> "If upon such investigation, the * * * regulation, practice or service complained of shall be found to be unreasonable, inadequate or unjustly discriminatory, the commission shall have power to and it shall determine and by order fix and order substituted therefor such * * * classification, regulation, practice or service as is or are just, reasonable and adequate * * * and shall make an

> order that the common carrier cease and desist from such violation, and shall conform to the regulation and practice so prescribed, and it shall cause a certified copy of each such order to be delivered to an officer or station agent of the common carrier affected thereby, which order shall, of its own force, take effect and become operative twenty days after the service thereof * * *."

Again, sec. 26-B:

> "No injunction shall issue suspending or staying any order of the commission, except upon application to court in chancery or to the judge thereof, notice to the commission having been given and hearing having been had thereon:"

Again, sec. 26-E:

> "In all actions under this section the burden of proof shall be upon complainant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable as the case may be."

Thus the legislature provided that the orders of the commission in cases of this kind should take effect promptly and be obeyed pending any litigation pertaining to their validity, unless the courts should, after hearing and notice, suspend the operation of the order.

It is also apparent from the above quotation that the Michigan Railroad Commission has been delegated the authority to deal with matters of discrimination by common carriers generally, and we contend that inasmuch as the "Tubbs Branch" had been operated by plaintiff in error as part of its general system under a printed tariff filed with the Michigan Railroad Commission, it was not competent for plaintiff in error to discriminate against the Fletcher Paper Co. by removing a portion of the track in question and suspending service on the branch without notice or without a canceling of the tariff in the manner provided by

law. It is not permissible under the laws of Michigan to cancel a tariff in the manner attempted by plaintiff in error, namely, by eliminating the branch from a station list (Record, page 10). We therefore contend that a railroad company cannot, in violation of statutory provisions, suspend service in the manner here attempted and then insist upon the same procedure as would be required in issuing an order for the granting of a new or additional service. In other words, it is within the province of the courts of Michigan to prevent the loss or destruction of property by the arbitrary and unwarranted acts of public service corporations, especially where in preventing such loss the procedure adopted includes a provision requiring the giving of security to prevent possible loss upon the part of the common carrier.

We respectfully submit that the order of the Michigan Supreme Court granting a writ of mandamus should be affirmed.

Respectfully submitted.

GRANT FELLOWS,
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DAVID H. CROWLEY,
Assistant Attorney General of Michigan,
Counsel for Defendant in Error
Michigan Railroad Commission.

DETROIT AND MACKINAC RAILWAY COMPANY *v.* MICHIGAN RAILROAD COMMISSION AND FLETCHER PAPER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 68. Argued November 10, 1915.—Decided April 3, 1916.

A judgment or decree which determines the particular cause is final in the sense of § 237, Jud. Code.

A proceeding in mandamus is an independent adversary suit, and a judgment awarding or refusing the writ is final within the meaning of § 237, Jud. Code.

The granting of a writ of mandamus to maintain or restore the *status quo* by requiring a railroad company to comply with an order of the State Railroad Commission of Michigan, which, under the statute of the State was *prima facie* lawful, pending the determination of a suit in equity brought by the railroad company to enjoin enforcement of the order, *held*, in view of the circumstances and requirement that a bond of indemnity be given, not to deprive the railroad company of due process of law guaranteed by the Fourteenth Amendment.

178 Michigan, 230, affirmed.

THE facts, which involve the constitutionality under the due process provision of the Fourteenth Amendment of an order granting a writ of mandamus enforcing obedience to an order of the Michigan Railroad Commission directing a railroad company to relay tracks removed by it from a logging spur, are stated in the opinion.

Mr. Fred A. Baker and *Mr. James McNamara* for plaintiff in error submitted:

It was not competent for the Supreme Court of Michigan while the case in the Wayne Circuit was pending and undetermined to order the railroad company to restore the Tubbs Branch and to resume service thereon.

The failure of the Michigan Railroad Commission to carry out its agreement to give a further hearing and an opportunity to introduce evidence, and the refusal of the Supreme Court of Michigan to give any such opportunity was a deprivation of property without due process of law and a denial of the equal protection of the laws.

The indemnity bond of $10,000 does not cure the error of the Supreme Court of Michigan in awarding the mandamus.

On the answers of the railroad company the Tubbs Branch has always been, and as proposed to be restored will certainly be, private and not public.

The Detroit & Mackinac Railway Company was at liberty whenever it saw fit to withdraw the Tubbs Branch from its alleged public use.

In support of these contentions, see *Arson* v. *Murphy*, 109 U. S. 238; *Barney* v. *Watson*, 92 U. S. 449; *Berrien Power Co.* v. *Circuit Judge*, 133 Michigan, 48; *Chicago &c. Ry.* v. *Chappel*, 124 Michigan, 72; *Chicago &c. Ry.* v. *Hough*, 61 Michigan, 507; *Cary* v. *Curtis*, 3 How. 239; *Chicago &c. Ry.* v. *Minnesota*, 134 U. S. 418; *De Lima* v. *Bidwell*, 182 U. S. 1; *Detroit & Mac. Ry.* v. *Mich. R. R. Com.*, 171 Michigan, 335; *Ekiu* v. *United States*, 142 U. S. 651; *Elliott* v. *Swartwout*, 10 Pet. 137; *Falsburg Power Co.* v. *Alexander*, 101 Virginia, 95; *Foule* v. *Mann*, 53 Iowa, 42; *Ford* v. *Chicago &c. Ry.*, 14 Wisconsin, 609; *Hovey* v. *Elliott*, 167 U. S. 409; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88; *Louis. & Nash. R. R.* v. *Garrett*, 231 U. S. 298; *Mann* v. *Pere Marquette Ry.*, 135 Michigan, 210; *Mo. Pac. Ry.* v. *Nebraska*, 217 U. S. 196; *Oregon Ry. & Nav. Co.* v. *Fairchild*, 224 U. S. 510; *People* v. *Lake Shore Ry.*, 52 Michigan, 227; *People* v. *Smith*, 21 N. Y. 595; *People* v. *D. G. H. & M. Ry.*, 79 Michigan, 417; *Pere Marquette Ry.* v. *Gypsum Co.*, 154 Michigan, 290; *Pipe Line Cases*, 234 U. S. 518; *Pumpelly* v. *Canal Co.*, 13 Wall. 168; *Roller* v. *Holly*, 176 U. S. 398; *Union Lime Co.* v.

Chicago &c. Ry., 233 U. S. 211; *Sholl* v. *German Coal Co.*, 118 Illinois, 427; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Wadley South. Ry.* v. *Georgia*, 235 U. S. 651; *Water Works Co.* v. *Burkhart*, 41 Indiana, 364.

Mr. D. H. Crowley, with whom *Mr. Grant Fellows* and *Mr. I. S. Canfield* were on the brief, for defendants in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a petition to the Supreme Court of Michigan by the Railroad Commission of that State for a writ of mandamus to enforce obedience to an order of the commission directing the Detroit & Mackinac Railway Company to relay one-half mile of rails removed by it from a five-mile logging spur, called Tubbs Branch, and to resume service thereon. The railroad company answered, and, after a hearing, the court granted the writ subject to a condition presently to be stated. 178 Michigan, 230.

The commission's action was invoked by a complaint presented by the Fletcher Paper Company, of which the railway company had due notice. Before the commission the railway company insisted that the logging spur was not a part of its railroad system and that its use had been only that of a private convenience; but the commission concluded from the pleadings and evidence that the fact was otherwise and made the order with the purpose of correcting what it deemed an unreasonable and unjust discrimination and an inadequate service within the meaning of the local statute, 3 Howell's Ann. Stat., 2nd ed., §§ 6526, 6537, 6545. Thereupon the railway company filed a bill in equity in the Circuit Court of Wayne County praying that the order be vacated and asking that its enforcement be temporarily and permanently enjoined. In the bill the railway company repeated its insistence

that the logging spur was not a part of its railroad system but only a private convenience, and charged that an adequate hearing was denied by the commission in that the issues were determined upon the evidence presented by the paper company and in contravention of an understanding, assented to by the commission, that if an objection of the railway company in the nature of a plea of *res judicata* should be overruled, as it afterwards was, the company would be afforded a further opportunity to present evidence in opposition to that of the paper company. The bill invoked the due process of law clause of the Fourteenth Amendment. Apparently the prayer for a temporary injunction was not insisted upon.

It was during the pendency of that suit that the mandamus proceeding was begun and carried to judgment in the Supreme Court. In this proceeding the railway company again asserted that the logging spur was only a private convenience and not a part of the railroad system used by it as a common carrier and that the commission had denied it an adequate opportunity to be heard upon that question, and further insisted that to require it to give effect to the commission's order in advance of a hearing and decision upon that question in the suit in equity would deprive it of the due process of law guaranteed by the Fourteenth Amendment.

In the course of its opinion the Supreme Court said, pp. 243–246:

"We are not called upon to consider and determine the merits of the controversy between the Fletcher Paper Company and respondent railway company upon the order of August 3, 1911. Such questions are involved in the case now pending before the circuit court for the County of Wayne in chancery, wherein the respondent railway company seeks to review, annul and set aside said order. The sole question before this court in this proceeding is whether the order of the railroad commission shall

take effect and become operative pending the hearing and determination of that chancery cause. . . .

"Relative to an order made by this commission this court has said: ' . . . Its orders stand until modified or set aside by it or by the courts. . . . Presumptively, the findings and orders of the commission are right. If attacked, the complainant has the burden of showing by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be.' *Detroit &c. R. R.* v. *Railroad Commission*, 171 Michigan, 335, 346.

* * * * * * * *

"The petitioner in the instant case before the railroad commission offered, and upon this hearing before this court keeps such offer good, to indemnify respondent for all costs and expenses incurred in re-laying the track taken up by it, with interest, and to pay all rates that may be fixed or charged by the railway company and approved by the commission, in case this order is vacated and set aside by the Wayne circuit court in chancery, or by this court, if an appeal is taken. This indemnity would save respondent harmless from any possible loss in complying with the order, and save petitioner from claimed irreparable damage to 21,000,000 feet of forest products during the probable term of years occupied in this litigation.

"It was held by this court that an order of the railroad commission is enforceable by mandamus, although a proceeding in equity to review it is pending. *Michigan R. R. Comm.* v. *Railroad Co.*, 159 Michigan, 580.

"This order is *prima facie* not unreasonable. There is no question but that the legislative intent clearly expressed in this statute was that the orders of the commission should be and continue in force during all subsequent proceedings until modified or set aside by the commission or by the courts.

"The statute provides a remedy by mandamus to en-

force the orders of the commission, and this court has granted such writs. Upon the facts presented, the writ should be granted in this case.

"Upon furnishing bond by the petitioner before the railroad commission, the Fletcher Paper Company, in the penal sum of $10,000 to indemnify respondent in manner and form as herein stated, with two sureties to be agreed upon between the parties, or approved by the clerk of this court, a writ of mandamus will issue as prayed."

And in the course of a separate opinion one of the Justices said, p. 248:

"So long as the respondent was operating the spur, accepting thereon and transporting over it freight for those who offered it, and so long as it published tariffs affecting such service, it was undoubtedly, as to such operations, within the scope of the act in question, and this we held in *Detroit &c. R. R.* v. *Railroad Commission*, 171 Michigan, 335. But whether the Michigan railroad commission has power under the statute to require respondent to continue to operate such a spur, or branch, against its will, and in face of its efforts to abandon it, is quite a different question. It is a question which we assume is presented in the pending chancery proceeding to set aside the order which in this proceeding is sought to be enforced. It need not be answered now."

The local statute, 3 Howell's Ann. Stat., 2nd ed., provides: (§ 6545) Orders of the commission shall take effect and become operative twenty days after service; (§ 6547) the commission may upon application rescind or alter any order; (§ 6548) all regulations, practices and services prescribed by the commission shall be in force and be *prima facie* lawful and reasonable until finally held otherwise in a suit brought for the purpose under § 6549, or until rescinded or altered by the commission under § 6547; (§ 6549) a carrier may, within thirty days after notice of an order, commence a suit in equity to vacate

it, the burden being upon the carrier to show that the order is unlawful or unreasonable. In such a suit original evidence may be introduced in addition to the transcript of that presented before the commission; and if evidence be introduced by the carrier which is different from or in addition to that presented before the commission the court, unless the parties stipulate to the contrary, shall transmit a copy thereof to the commission and stay further proceedings for the time being. The commission shall consider the evidence transmitted and may alter or rescind its order and shall report its action to the court. If the commission rescind its order the suit shall be dismissed; if it alter the order, the same in its changed form shall take the place of the original and judgment shall be rendered thereon as though the last action of the commission had been taken at first; (§ 6570) in addition to all other remedies, the commission, and likewise any party in interest, may compel compliance with an order of the commission by a proceeding in mandamus, injunction or other appropriate civil remedy.

It will be perceived that the Supreme Court, applying the statute, held that the "sole question" for decision was whether the commission's order should be given effect pending the determination of the equity suit, and then, coming to dispose of that question, held that due regard for the provisions of the statute, especially §§ 6545, 6548 and 6549, and for the relative consequences of enforcing or refusing to enforce the order required that it be enforced by mandamus, if a suitable bond was given to indemnify the railway company for any resulting loss in the event the order ultimately should be vacated in the equity suit.

Our jurisdiction is called in question upon the ground that the judgment is not final in the sense of § 237, Jud. Code, upon which our power to review depends, because the judgment does not determine the merits and end the

litigation. But, as this court has said, "all judgments and decrees which determine the particular cause" are final in the sense of the statute. *Weston* v. *Charleston*, 2 Pet. 449, 463–465; *Central Transportation Co.* v. *Pullman Co.*, 139 U. S. 24, 40; *Mt. Vernon Cotton Co.* v. *Alabama Power Co.*, 240 U. S. 30. This view has prevailed through a century of practice in reviewing judgments and decrees dismissing causes for want of jurisdiction or for other reasons not decisive of the merits. And it is settled that a proceeding in mandamus is an independent adversary suit and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute. *Davies* v. *Corbin*, 112 U. S. 36, 40; *McPherson* v. *Blacker*, 146 U. S. 1, 24; *American Express Co.* v. *Michigan*, 177 U. S. 404, 406.

Under the local statutes, as interpreted by the Supreme Court of the State, whether the logging spur was merely a private convenience or was so used and operated by the railway company that the latter was not free to discontinue service thereon, in the circumstances existing when the rails were removed, was primarily a question for the commission and secondarily for the Wayne Circuit Court wherein the commission's order was sought to be vacated. By the order the commission resolved this question against the railway company. The order was valid upon its face and recited that it was made after a hearing and due consideration of the proofs and briefs of the parties. Whether the hearing was adequate and whether the facts relating to the logging spur were such as to sustain the order were matters which were in issue in the suit in the Wayne Circuit Court, where the railway company was at liberty to produce any evidence legitimately bearing upon the propriety of the order. It was in this situation that the Supreme Court, having regard to the statutory requirement that the order be given effect and treated as *prima facie* lawful and reasonable until adjudged otherwise in

the suit brought to vacate it, and also having regard to the comparative consequences of enforcing or refusing to enforce it while that suit was undetermined, held that it ought to be enforced by mandamus, if a suitable bond was given to indemnify the railway company should the order ultimately be vacated. In this we perceive no deprivation of due process. The granting of an order or writ to maintain or restore the *status quo* pending the outcome of existing litigation, which really is what was done here, has been practiced by the courts of the country since before the Constitution was adopted, and the claim that relief of this nature cannot be granted, even upon condition that ample security be given to make good any loss that may be sustained thereby, without encroaching upon the due process of law secured by the Constitution is manifestly without merit.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS is of opinion that the judgment is not final within the meaning of § 237, Jud. Code, and therefore that the writ of error should be dismissed.